No. 545.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 34

EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, PETITIONER,

vs.

CARL ROCHLING ET AL., TRADING AS GEBRUEDER ROCHLING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 25, 1928

CERTIORARI GRANTED APRIL 26, 1928

(31,792)

(31,792)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 322

EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, PETITIONER,

vs.

CARL ROCHLING ET AL., TRADING AS GEBRUEDER ROCHLING

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 15, 1926

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 34996

In the Matter of Oscar L. Gubelman et al., Trading as Knauth, Nachod & Kuhne, etc., Bankrupts

In the Matter of the Reclamation Claim of Karl Röchling et al., Trading as Gebrueder Röchling

Petition for Appeal and Order Allowing Same

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above named reclaimants, conceiving themselves aggrieved by the Order of this Court made and entered on May 27th, 1925, in the above entitled suit, do hereby appeal from said Order, for the reasons stated in their Assignment of Errors, to the United States Circuit Court of Appeals for the Second Circuit and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said Order was made, duly authenticated, may be sent to the said United [fol. 2] States Circuit Court of Appeals for the Second Circuit; and in connection with this petition petitioners herewith present their said Assignment of Errors.

Dated June 3, 1925.

Kellogg, Emery, Inness-Brown & Cuthell, Attorneys for Reclaimants.

Office and P. O. address: 120 Broadway, Borough of Manhattan, City of New York.

And now, to wit, on the 5th day of June, 1925.

It is ordered that the above appeal be allowed as prayed for.

William Bondy, United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The above named reclaimant having appealed to the United States Circuit Court of Appeals for the Second Circuit from the order of this Court made and entered in the above entitled cause, filed in the Office of the Clerk of the Court on the 27th day of May, 1925, respectfully alleges and makes the following Assignment of Errors herein:

1. That the Court erred in entering the order appealed from dismissing the petition herein and said order is not supported by and is contrary to the facts as revealed by the pleadings herein and is against law and equity.

2. That the Court erred in holding that the writing on the checks herein was not restrictive in its effect preventing [fol. 4] the passage of title thereto to the firm of Knauth, Nachod & Kuhne.

3. That the Court erred in holding that because of the prior dealings of the reclaimants and Knauth, Nachod & Kuhne gave title to the latter in the checks dated June 15, 1923, from and after the time of delivery thereof.

4. That the Court erred in failing to hold that the amended petition herein entitled the reclaimants to reclaim against the estate of the above named bankrupts.

Dated New York, June 3, 1925.

Kellogg, Emery, Inness-Brown & Cuthell, Attorneys for Reclaimants.

Office & P. O. Address: 120 Broadway, New York City.

[fols. 5 & 6] Citation, in usual form, omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED PETITION

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Your petitioners, Karl Röchling, Louis Röchling, Ernst Röchling, Eduard Röchling, Alexander Röchling, Heinrich Röchling, August Röchling, Albrecht Röchling, Max Röch-
[fol. 8] ling, Otto Röchling, Herman Röchling and Robert Röchling, trading as co-partners under the firm name and style of Gebrueder Röchling, hereinafter referred to as Gebrueder Röchling, by their attorney, Chester W. Cuthell, respectfully show:

1. That your petitioners, Karl Röchling, Louis Röchling, Ernst Röchling, Eduard Röchling, Alexander Röchling, Heinrich Röchling, August Röchling, Albrecht Röchling, Max Röchling, Otto Röchling, Herman Röchling and Robert Röchling, are co-partners trading under the firm name and style of Gebrueder Röchling, hereinafter referred to as Gebrueder Röchling.

2. That Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers, John R. Hall, Mary W. Knauth and Theodore W. Knauth, hereinafter collectively referred to as Knauth, Nachod & Kuhne, against whom a petition for adjudication in bankruptcy has been filed, was, at and before the filing of said petition and still is justly and truly indebted to the said Gebrueder Röchling.

3. That on June 15, 1923, there were delivered to the said Knauth, Nachod & Kuhne two checks in the sum of $30,000 each by the National Bank of Commerce and the National City Bank of New York, respectively, which checks were to be collected by Knauth, Nathod & Kuhne through the New York Clearing House in accordance with the directions appearing on the face of said checks and the proceeds of which checks, after being thus collected, were to be
[fol. 9] deposited to the account of the Frankfort Branch of Gebrueder Röchling with the said Knauth, Nachod & Kuhne.

4. That no part of said debt has been paid; that there are no set-offs or counterclaims to the same and that said Gebrueder Röchling is entitled to priority in the payment of said $60,000 by reason of the facts hereinafter set forth.

National Bank of Commerce Check

5. That on or about May 17th and June 11th, 1923, Gebrueder Röchling sent letters to Lloyd's Bank, Ltd., Cox's Branch, London, which were duly received by the latter. True and accurate translations of said letters are hereto attached and marked Exhibits "A" and "B."

6. That pursuant to the terms of said letters of May 17th and June 11th, 1923, Gebrueder Röchling did undertake and agree to pay to Lloyd's Bank, Ltd., Cox's Branch, London, on June 15, 1923, the sum of £6485-12-11.

7. That in consideration of the undertaking and agreement of Gebrueder Röchling to pay said sum of £6485-12-11 the said Lloyd's Bank, Ltd., Cox's Branch, London, did undertake and agree to pay the sum of $30,000 on June 15, 1923, to the account of the said Gebrueder Röchling with Knauth, Nachod & Kuhne.

8. That in the fulfillment of this said undertaking and agreement the said Gebrueder Röchling did, on June 15, 1923, pay to said Lloyd's Bank, Ltd., Cox's Branch, [fol. 10] London, the sum of £6485-12-11, no part of which sum has at any time been regained by or paid over to the said Gebrueder Röchling.

9. That in the fulfillment of its said undertaking and agreement the said Lloyd's Bank Ltd., Cox's Branch, London, did prior to June 15, 1923, instruct the National Bank of Commerce in New York to deposit the sum of $30,000 to the account of Gebrueder Röchling, Frankfort Branch, with Knauth, Nachod & Kuhne, debiting the amount of said $30,000 to the account of the said Lloyd's Bank, Ltd., Cox's Branch, London, with the said National Bank of Commerce in New York.

10. That attached hereto and marked Exhibit "C" is a true and accurate copy of instructions forwarded by Lloyd's Bank, Ltd., Cox's Branch, London, to the National Bank

of Commerce, New York and received by the latter prior to June 15, 1923.

11. That the said National Bank of Commerce was not the agent of Gebrueder Röchling and was in this transaction to them unknown, and the said Gebrueder Röchling did not at the time said check hereinafter more particularly described was drawn have an account with the said National Bank of Commerce.

12. That on June 15, 1923, the said National Bank of Commerce did deliver its Cashier's check in the sum of $30,000 to Knauth, Nachod & Kuhne. A true and accurate photostatic copy of said check, front and back, is hereto attached and marked Exhibit "D."

[fol. 11] 13. That in delivering said check the National Bank of Commerce was acting pursuant to the instructions received by it from Lloyd's Bank, Ltd., Cox's Branch, London, as above set forth.

14. That said check provided:

"Pay to the order of Knauth, Nachod & Kuhne $30,000 for account of Röchling Bank, Gebt. Frankfort-on-Main, through the New York Clearing House."

15. That on June 15, 1923, Knauth, Nachod & Kuhne signed a receipt, a true and accurate photostatic copy of which is hereto attached and marked Exhibit "E", stating it had received from the National Bank of Commerce in New York Cashier's check for the above amount ($30,000) for account of Röchling Bank, Gebt. Frankfort-on-Main.

16. That by reason of the wording of said check said Knauth, Nachod & Kuhne well knew that it was bound to place the proceeds thereof in the account of Frankfort Branch of Gebrueder Röchling and that said Knauth, Nachod & Kuhne was not entitled to apply the proceeds to its own purposes.

17. After receiving the said check said Knauth, Nachod & Kuhne caused the same to be endorsed as follows:

"Pay to Guaranty Trust Company or order June 15, 1923.

Knauth, Nachod & Kuhne, New York, N. Y."

[fol. 12] 18. That during business hours on June 15, 1923, the said check endorsed as above set forth, was delivered by Knauth, Nachod & Kuhne to Guaranty Trust Company, where Knauth, Nachod & Kuhne maintained a general checking account and the amount of $30,000 being the amount of said check was credited by Guaranty Trust Company to the said account of Knauth, Nachod & Kuhne on that same day.

19. That as appears from further endorsements on the back of said check, payment was received by said Guaranty Trust Company of New York through the New York Clearing House on June 16, 1923.

20. That about ten o'clock P. M. on June 15, 1923 a petition in bankruptcy against the above named bankrupts was presented to Judge John C. Knox together with a petition for the appointment of a receiver; that annexed to said petition for the appointment of a receiver was a written consent executed on behalf of the said bankrupts; that an order appointing a receiver was signed by Judge Knox that evening as hereinafter set forth and that on the following morning, June 16, 1923 at 9:30 o'clock the aforesaid petition in bankruptcy, petition for the appointment of a receiver and order appointing a receiver were filed in the office of the Clerk of the United States District Court for the Southern District of New York.

21. Upon information and belief that Middleton S. Borland, Esq., was duly appointed receiver and pursuant to the order of his appointment took possession of the prop-[fol. 13] erty of said Knauth, Nachod & Kuhne at the opening of business on the morning of June 16, 1923, and after orders were entered adjudicating all of the above named bankrupts, the said Middleton S. Borland was elected to act and continues to act as trustee for the said estate of the above named bankrupts.

22. That at the time when said Knauth, Nachod & Kuhne received the said check on June 15, 1923 Knauth, Nachod & Kuhne well knew itself to be insolvent.

23. That the payment made through the New York Clearing House as above set forth was made after the petition

in bankruptcy had been filed in the office of the Clerk of the United States Court for the Southern District of New York on the morning of June 16, 1923.

24. Upon information and belief that at the close of business on June 15, 1923 the account of Knauth, Nachod & Kuhne with the said Guaranty Trust Company was as follows:

(a) After duly crediting to the general checking account of Knauth, Nachod & Kuhne the said check for $30,000, there remained cash to the credit of Knauth, Nachod & Kuhne in said account in the amount of $22,369.90;

(b) A debt upwards of $301,551.97 due Guaranty Trust Company by Knauth, Nachod & Kuhne on a loan.

25. Thereafter and during the month of July, 1923 the accounts of Guaranty Trust Company with Knauth, Nachod & Kuhne were settled in the following manner:

[fol. 14] (a) Collateral pledged by Knauth, Nachod & Kuhne in the amount of $302,716.42 was sold in payment of the debt, interest, stamps, commissions, etc. due by the said Knauth, Nachod & Kuhne to the Guaranty Trust Company.

(b) The Guaranty Trust Company thereupon paid to the receiver the $22,369.90 above referred to, plus an additional $1,164.65, the latter being an adjustment of cash secured from the sale of securities above mentioned, and the Guaranty Trust Company thereupon returned to Middleton S. Borland, as receiver, the securities listed in Exhibit "F" hereto annexed.

26. That by reason of the foregoing said Gebrueder Röchling is entitled to receive the cash and securities listed in Exhibit "F" or so much thereof or the proceeds of so many thereof as should be equivalent to the sum of $30,000, together with interest from the 15th day of June, 1923 to date.

The National City Bank of New York Check

27. That on or about May 15th and June 11th, 1923, Gebrueder Röchling sent letters to Swiss Bank Corporation, London, which were duly received by the latter. True

and accurate translations of said letters are hereto attached and marked Exhibits "G" and "H."

28. That pursuant to the terms of said letters of May 15th and June 11th, 1923 Gebrueder Röchling did undertake and agree to pay to Swiss Bank Corporation, London, on June 15th, the sum of £6483-19-3.

[fol. 15] 29. That in consideration of the undertaking and agreement of Gebrueder Röchling to pay said sum of £6483-19-3 the said Swiss Bank Corporation, London, did undertake and agree to pay the sum of $30,000 on June 15, 1923, to the account of the said Gebrueder Röchling with Knauth, Nachod & Kuhne.

30. That in the fulfillment of this said undertaking and agreement the said Gebrueder Röchling did, on June 15, 1923, pay to said Swiss Bank Corporation, London, the sum of £6483-19-3, no part of which sum has at any time been regained by or paid over to the said Gebrueder Röchling.

31. That in the fulfillment of its said undertaking and agreement the said Swiss Bank Corporation, London, did, prior to June 15th, 1923, instruct the National City Bank of New York to deposit the sum of $30,000 to the account of Gebrueder Röchling, Frankfort Branch with Knauth, Nachod & Kuhne, debiting the amount of said $30,000 to the account of the said Swiss Bank Corporation, London, with the said National City Bank of New York.

32. That the said National City Bank of New York was not the agent of Gebrueder Röchling and was in this transaction to them unknown, and the said Gebrueder Röchling did not at the time said check hereinafter more particularly described was drawn have an account with the said National City Bank of New York.

33. That on June 15, 1923, the said National City Bank of New York did deliver its Cashier's check in the sum of [fol. 16] $30,000 to Knauth, Nachod & Kuhne. A true and accurate photostatic copy of said check, front and back, is hereto attached and marked Exhibit "I."

34. That in delivering said check the National City Bank of New York was acting pursuant to the instructions re-

ceived by it from Swiss Bank Corporation, London, as above set forth.

35. That said check provided:

"Pay to the order of Knauth, Nachod & Kuhne A/C Gebr. Röcheling, Frankfort a/m. Thirty Thousand ($30,000) Dollars, payable only through New York Clearing House."

36. That on June 15, 1923, Knauth, Nachod & Kuhne signed a receipt, a true and accurate photostatic copy of which is hereto attached and marked Exhibit "J."

37. That by reason of the wording of said check said Knauth, Nachod & Kuhne well knew that it was bound to place the proceeds thereof in the account of Frankfort Branch of Gebrueder Röchling and that said Knauth, Nachod & Kuhne was not entitled to apply the proceeds to its own purposes.

38. After receiving the said check said Knauth, Nachod & Kuhne caused the same to be endorsed as follows:

"Pay to American Exchange National Bank or order, June 15, 1923.

Knauth, Nachod & Kuhne, New York, N. Y."

[fol. 17] 39. That during business hours on June 15, 1923, the said check so endorsed was delivered by Knauth, Nachod & Kuhne to American Exchange National Bank where Knauth, Nachod & Kuhne maintained a general checking account and the amount of $30,000, being the amount of said check was credited by American Exchange National Bank to the said account of Knauth, Nachod & Kuhne on that same day.

40. That as appears from further endorsements on the back of said check, payment was received by said American Exchange National Bank through the New York Clearing House on June 16, 1923.

41. That about ten o'clock P. M. on June 15, 1923, a petition in bankruptcy against the above named bankrupts was presented to Judge John C. Knox together with a

petition for the appointment of a receiver; that annexed to said petition for the appointment of a receiver was a written consent executed on behalf of the said bankrupts; that an order appointing a receiver was signed by Judge Knox that evening as hereinafter set forth and that on the following morning, June 16, 1923, at 9:30 o'clock the aforesaid petition in bankruptcy, petition for the appointment of a receiver and order appointing a receiver were filed in the office of the Clerk of the United States District Court for the Southern District of New York.

42. Upon information and belief that Middleton S. Borland, Esq., was duly appointed receiver and pursuant to the order of his appointment took possession of the prop- [fol. 18] erty of said Knauth, Nachod & Kuhne at the opening of business on the morning of June 16, 1923, and after orders were entered adjudicating all of the above named bankrupts, the said Middleton S. Borland was elected to act and continues to act as trustee for the said estate of the above named bankrupts.

43. That at the time when said Knauth, Nachod & Kuhne received the said check on June 15, 1923, Knauth, Nachod & Kuhne well knew itself to be insolvent.

44. That the payment made through the New York Clearing House as above set forth was made after the petition in bankruptcy had been filed in the office of the Clerk of the United States Court for the Southern District of New York on the morning of June 16, 1923.

45. Upon information and belief that at the close of business on June 15, 1923, the account of Knauth, Nachod & Kuhne with the said American Exchange National Bank was as follows:

(a) After duly crediting to the general checking account of Knauth, Nachod & Kuhne the said check for $30,000, there remained cash to the credit of Knauth, Nachod & Kuhne in the said account in the amount of $212,128.56.

(b) A debt upwards of $251,580.89 due American Exchange National Bank by Knauth, Nachod & Kuhne on a loan.

46. Thereafter and during the month of July, 1923, the accounts of American Exchange National Bank with [fol. 19] Knauth, Nachod & Kuhne were settled in the following manner:

(a) American Exchange National Bank applied cash on deposit amounting to $212,128.56, sold securities as collateral for the loan amounting to $20,600.50 and received from Middleton S. Borland, as receiver, check for $18,851.83.

(b) The American Exchange National Bank thereupon turned over to Middleton S. Borland, as receiver, the securities listed in Exhibit "K" hereto annexed.

47. That by reason of the foregoing said Gebrueder Röchling is entitled to receive the cash and securities listed in Exhibit "K" or so much thereof or the proceeds of so many thereof as should be equivalent to the sum of $30,000, together with interest from the 15th day of June 1923, to date.

48. That the petition herein made against the persons above named is without prejudice to any rights against William C. Peyton, Anne du Pont Peyton, George W. Perkins, Evelina V. Perkins, Edward W. Freeman and Dorothy W. Freeman, which petitioners have or may have, and petitioners specifically reserve all such rights in conformity with the provisions of the order made herein by the Honorable John C. Knox, United States District Judge under date of January 9, 1924, all as more particularly set out in said order, to which reference is made and which is to be read as a part hereof.

[fol. 20] 49. That the petition herein made against the persons above named is without prejudice to any rights against National Bank of Commerce in New York, Guaranty Trust Company of New York, National City Bank of New York, American Exchange National Bank of New York or any of them, which petitioners have or may have in connection with the checks hereinbefore described or any transactions connected with said checks or any of them.

Wherefore your petitioners pray that the Court enter an order decreeing that the petitioners are entitled to a lien

upon the moneys or securities in the hands of the trustee, more particularly described in Exhibits "F" and "K" hereof in the amount of $60,000, together with interest from the 15th day of June, 1923 superior to any and all rights of the bankrupts or the trustee or any other creditor herein, and that the trustee be decreed to pay the said sum with interest to the petitioners out of the moneys and property in his hands.

Dated New York, February 6th, 1925.

Kellogg, Emery, Inness-Brown & Cuthell, Attorneys for Petitioners.

Office & P. O. Address: 120 Broadway, New York City.

[fol. 21] *Duly sworn to by Chester W. Cuthell. Jurat omitted in printing.*

[fol. 22] EXHIBIT "A" TO AMENDED PETITION

Gebt. Röchling,
Foreign Bill of
Exchange Dept.

Frankfort on Main
May 14, 1923.

Lloyds Bank Ltd. (Cox's Branch)
London.

We take over from you
as agreed: direct

M11652	$30,000.	New York,	15/6	46256

for which we credit you in dollar term-account.
The countervalue of:

£6,485. 12. 11. 15 6

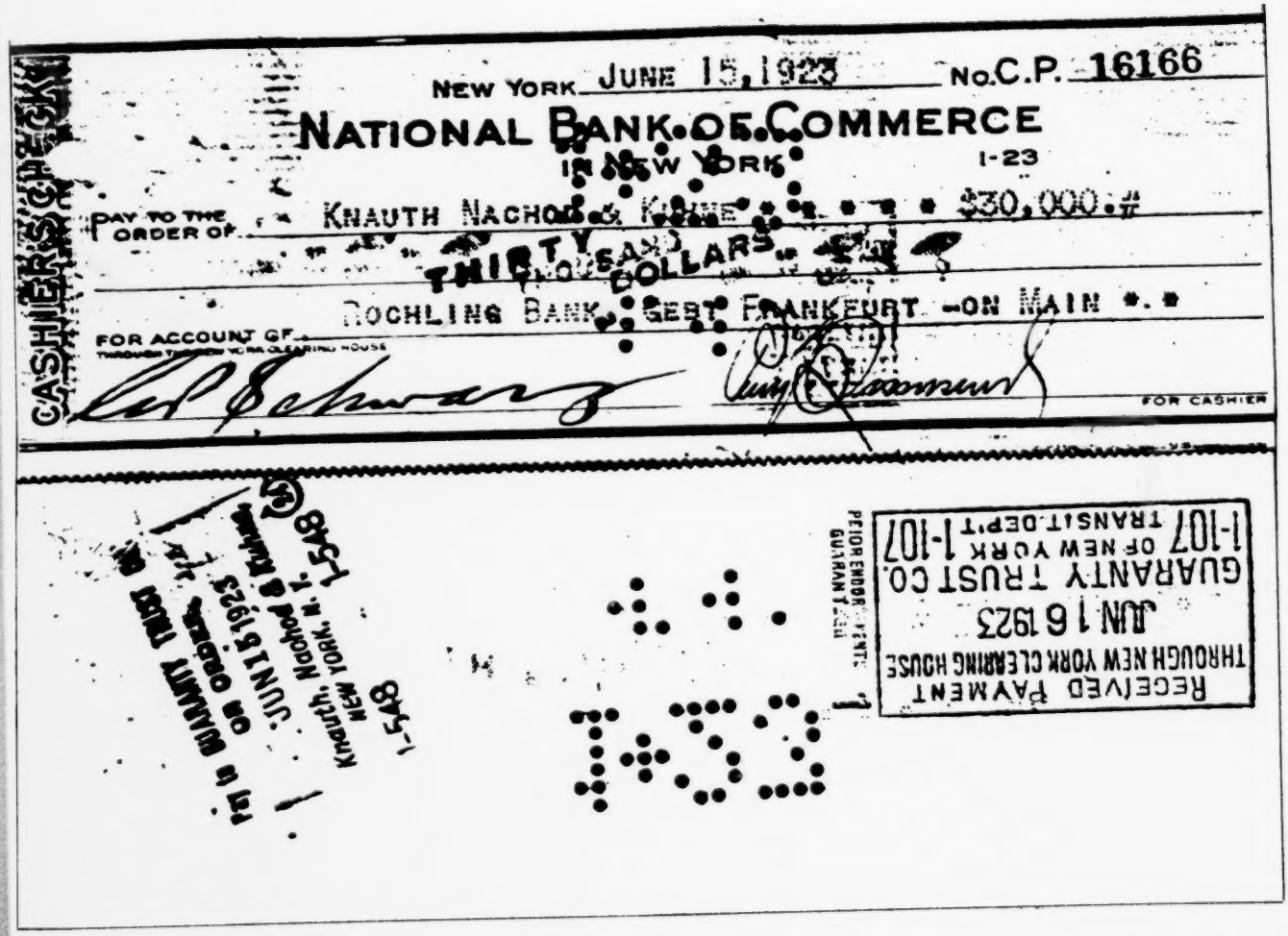
we are meanwhile debiting to your pound term-account.
46256

Yours truly, Gebr. Röchling. (Sgd.) —— ——.

B of E.
2193

EXHIBIT "D"

[fols. 25 + 26]



CASHIER'S CHECK

NEW YORK JUNE 15, 1923 No. C.P. 16166

NATIONAL BANK OF COMMERCE
IN NEW YORK
1-23

PAY TO THE ORDER OF KNAUTH NACHOD & KÜHNE $30,000.#

THIRTY THOUSAND DOLLARS

ROCHLING BANK, GEBT FRANKFURT -ON MAIN

FOR ACCOUNT OF

FOR CASHIER

RECEIVED PAYMENT
THROUGH NEW YORK CLEARING HOUSE
JUN 16 1923
GUARANTY TRUST CO.
OF NEW YORK
1-107 TRANSIT DEPT 1-107

PRIOR ENDORSEMENTS GUARANTEED

PAID BY GUARANTY TRUST CO.
ON ORDER OF
JUN 16 1923
KNAUTH, NACHOD & KÜHNE
NEW YORK, N. Y.
1-548

[fol. 23] EXHIBIT "B" TO AMENDED PETITION

Gebr. Röchling
Foreign Bill of
Exchange Dept.
Lloyds Bank Ltd. Cox's Branch,
London.

Frankfort-on-Main,
June 11, 1923

On the basis of our agreement of May 14, you have to deliver to us:

No. 11652 $30,000.— New York at 46256
per June 15, 1923

We request you to procure this amount for us at:

Knauth, Nachod & Kuhne, New York,

for which we will credit you, upon receipt, in Dollar term-account.

For the countervalue of

£6485. 12. 11. L'don. Value June 15, 1923

we debit your pound term-account, and you will kindly debit us in L. s. d pound account.

Yours very truly, pp. Gebr. Röchling. (Sgd.)
—— ——.

[fol. 24] EXHIBIT "C" TO AMENDED PETITION

"Pay 30,000 value fifteenth to Knauth, Nachod and Kuhne New York for account of Rochling Bank, Gebt. Frankfort-on-Main."

(Here follows Exhibit "D," side folio pages 25 and 26)

[fol. 27] EXHIBIT "E" TO AMENDED PETITION

No. C. P. 216,166

New York, June 15, 1923.

Knauth, Nachod & Kuhne. * * * $30,000.# Received from National Bank of Commerce in New York Cash-

ier's Check for the Above Amount for account of Rochling Bank, Gebt Frankfort-on-Main. * * *

Copy

in accordance with instructions dated 6-11-23.

Received from London, England, Lloyd's Bank Ltd. (Cox's Branch.)

(Sign here:) —— ——.

[fol. 28] EXHIBIT "F" TO AMENDED PETITION

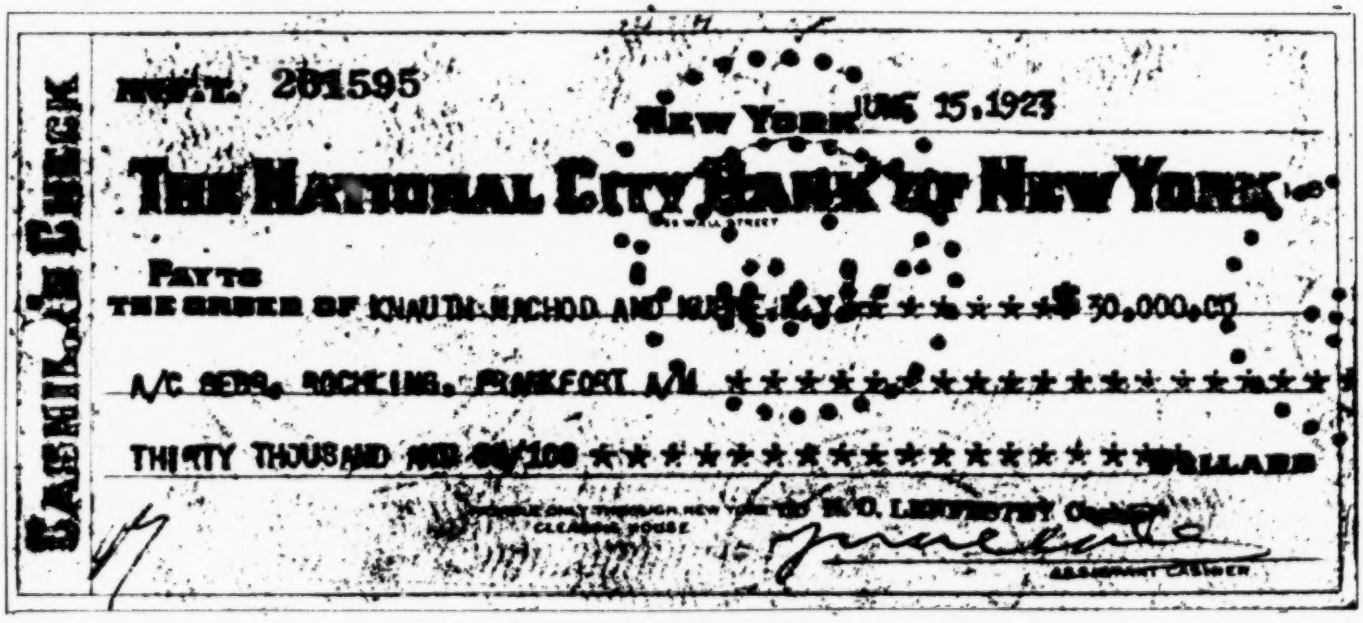
Cash and Securities Returned by Guaranty Trust Company To Receiver of Knauth, Nachod & Kuhne on or After June 16th, 1923

Surplus from sale of securities pledged by Knauth, Nachod & Kuhne with Guaranty Trust Company covering a loan of $301,551.77, said securities being sold for $302,716.42 leaving as said balance	$1,164.65
Cash balance in Knauth, Nachod & Kuhne's checking account	22,369.90
Securities owned by Knauth, Nachod & Kuhne and returned by Guaranty Trust Company:	
800 shares Consolidated Cigar Company—value about	18,000.00
Securities in which margin customers of Knauth, Nachod & Kuhne have an interest, returned by Guaranty Trust Company:	
100 DuPont de Nemours Debentures,	
100 Market Street Railway prior preferred stock.	
100 shares New Orleans, Texas & Mexico,	
100 shares United States Steel Company preferred,	
200 shares Utah Copper Company.	
100 shares Standard Oil Company of New Jersey, preferred.	

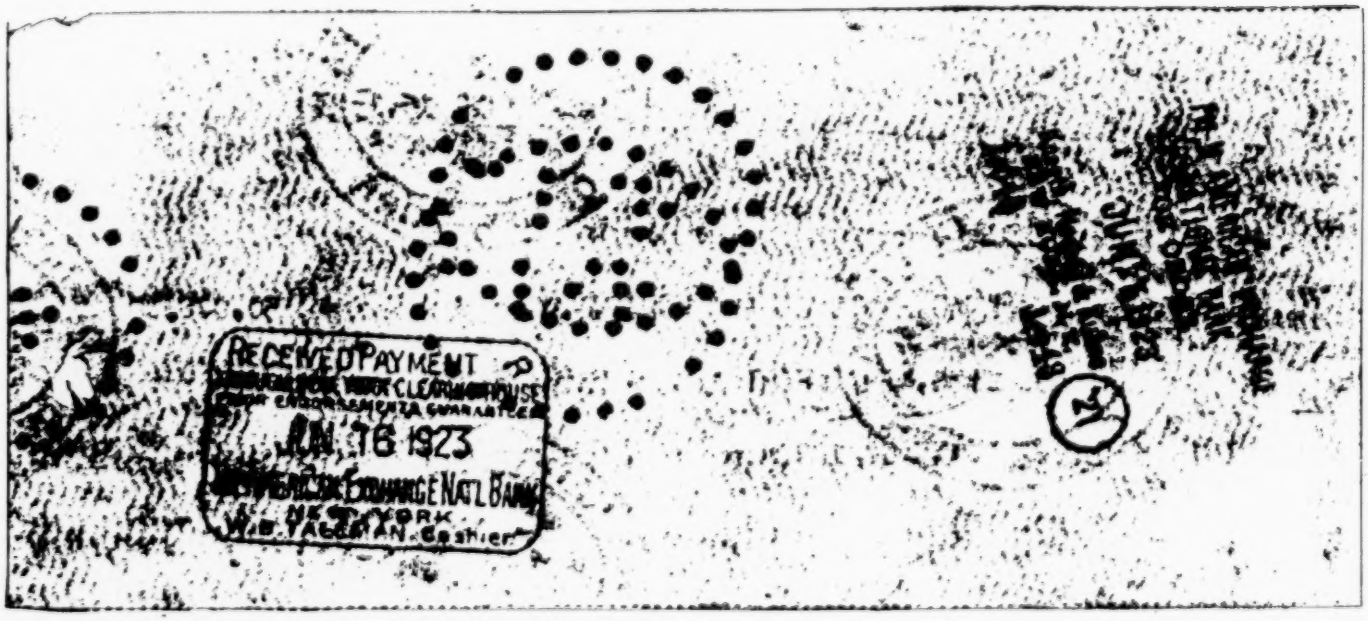
[folo. 31+32]

EXHIBIT "I"

Front of Check.


CASHIER'S CHECK
No. T. 261595
NEW YORK JUNE 15, 1923
THE NATIONAL CITY BANK OF NEW YORK
PAY TO
THE ORDER OF KNAUTH NACHOD AND KUHNE, N.Y. $30,000.00
A/C SEBS. ROCHLING. FRANKFORT A/M
THIRTY THOUSAND AND 00/100 DOLLARS
PAYABLE ONLY THROUGH NEW YORK CLEARING HOUSE
ASSISTANT CASHIER

Back of Check.



[fol. 29] EXHIBIT "G" TO AMENDED PETITION

Ger. Eng. 12/26/24.

Gebr. Rochling, Bank, Mainzerlandstr. 23

Frankfort on Main, May 15, 1923.

Swiss Bank Corporation, London:

(Foreign Bill of Exchange Dept.)

We take over from you as agreed: direct: M.11695 $30,000—New York, Value: June 15, at: 46268, for which we debit you on Dollar term-account.

The countervalue of £6,483-19-3, Value June 15, we are crediting to your £ term-account.

Yours very truly, p. p. Gebr. Rochling. (Signed) —— ——.

22,325.— 44650. 2318.

[fol. 30] EXHIBIT "H" TO AMENDED PETITION

Gebr. Röchling, Bank

Frankfort on Main, June 11, 1923.

Swiss Bank Corporation, London.

(Foreign Bill of Exchange Dept.)

On the basis of our agreement of May 15th, you have to deliver to us No. 11695. $30,000—New York, at 46268 per June 15, 1923.

We request you to procure this amount for us at Knauth, Nachod & Kuhne, New York, for which we will credit you, upon receipt, in Dollar term-account.

For the countervalue of £6483-19-33, L'don, Value June 15, 1923, we debit your Pound term-account, and are crediting you with the pound amount through Lloyds Bank, Cox's Branch, London.

Yours very truly, pp. Gebr. Röchling. (Sgd.) —— ——.

(Here follows Exhibit I, side folio pages 31 and 32.)

[fol. 33] EXHIBIT "J" TO AMENDED PETITION

Duplicate Receipt

June 15, 1923.

Received from the National City Bank of New York by Knauth, Nachod and Kuhne, N. Y. $30,000.00 A/C Gebr. Rochling, Frankfort A/M Thirty Thousand and 00/100 Dollars.

(Signature:) H. L.

Received Payment Jun. 15, 1923. Knauth, Nachod & Kuhne, New York.

[fol. 34] EXHIBIT "K" TO AMENDED PETITION

Securities Belonging, in Whole or in Part, to Knauth, Nachod & Kuhne and Returned to the Receiver of Knauth, Nachod & Kuhne by the American Exchange National Bank of New York.

100	Underwood Typewriter.
500	Mexican Seaboard V. T. certificates.
410	Fajardo Sugar.
50	" "
50	United States Steel common.
$10,000	Chicago, Milwaukee & St. Paul 4½, 2014.
5,000	Chesapeake & Ohio 5/46.
40,000	Erie Convertible 4/53.
16,000	Rio de Janeiro 8/47.
10,000	" " " 8/46.
8,000	St. Louis & San Francisco Income 6/60.
200	American Cotton Oil Preferred.
550	Central Aguirre Sugar.
100	Hudson Motors.
100	Manhattan Ry. Guaranteed.
200	National Cloak & Suit Common.
200	Northern Pacific.
1,200	Ray Consolidated Copper.
100	Reading.
500	Southern Pacific.
400	Tennessee Copper & Chemical.
1,500	Transcontinental Oil.

[fol. 35] UNITED STATES DISTRICT COURT

[Title omitted]

Answer to Amended Petition

Middleton S. Borland, the Trustee herein, answering the petition of Gebr. Röchling, respectfully alleges as follows:

I. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraphs "6," "7," "9," "13," "16," "22," and "26," of the petition, and therefore denies the same.

II. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "3" of the petition, and therefore denies the same, except that he admits on June 15, 1923, there were delivered to Knauth, Nachod & Kuhne two checks, in the sum of $30,000 each, by the National Bank of Commerce and the National City Bank of New York, respectively.

[fol. 36] III. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "4" of the petition, and therefore denies the same, except that he admits that no part of the debt of the bankrupts to the petitioner, arising out of the transactions with reference to said two $30,000 checks, has been paid to the said petitioner and that there are no set-offs or counterclaims to the claims asserted by the petitioner herein.

IV. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "8" of the petition, and therefore denies the same, except that he admits that petitioner did on June 15, 1923, pay to Lloyd's Bank, Ltd., Cox's Branch, London, the sum of £6485-12-11, no part of which sum has at any time been regained by, or paid over to, petitioner.

V. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "11," of the petition, and therefore denies the same, except that he admits that petitioner did

not, at the time of the drawing of the check referred to in paragraph "11" of the petition, have an account with the National Bank of Commerce.

VI. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraphs "28," "29," "31," "34," "37," "43" and "47," of the petition, and therefore denies the same.

[fol. 37] VII. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "30" of the petition, and therefore denies the same, except that he admits that petitioner did on June 15, 1923, pay to Swiss Bank Corporation, London, the sum of £6483-19-3, no part of which sum has at any time been regained by, or paid over to, petitioner.

VIII. That he has no knowledge or information sufficient to form a belief with respect to each and every allegation set forth in paragraph "32" of the petition, and therefore denies the same, except that he admits that the petitioner did not, at the time of the drawing of the check referred to in paragraph "32" of the petition, have an account with the National City Bank of New York.

Wherefore, the Trustee prays for an order dismissing the petition herein with costs and disbursements.

Rosenberg & Ball, Attorneys for Trustee.

Office & P. O. Address: 74 Broadway, Borough of Manhattan, City of New York.

[fol. 38] *Duly sworn to by George G. Ernst. Jurat omitted in printing.*

[fol. 39] In United States District Court

[Title omitted]

Stipulation of Facts

For the purpose of any trial of the reclamation claim of Gebruder Röchling (hereinafter referred to as the claimant) the following facts are stipulated to be true, and this

stipulation shall be available for use by the claimant and Trustee subject to the provisions hereinafter contained:

I. On June 15, 1923, the day of the receipt by Knauth, Nachod & Kuhne from the National Bank of Commerce of the check for $30,000, referred to in paragraph "3" of the reclamation petition of the claimant, Knauth, Nachod & Kuhne credited to the account of the claimant on the books of Knauth, Nachod & Kuhne, the sum of $30,000, the amount of said check, and also made an entry on its books [fol. 40] that said claimant was entitled to interest on said sum of $30,000 from June 15, 1923. Thereafter the receiver and/or trustee of said Knauth, Nachod & Kuhne, in preparing a statement of the account of the claimant with Knauth, Nachod & Kuhne, as of the close of business on June 15, 1923, did include in said account interest for one day, to wit: interest on said sum of $30,000 for the day of June 15, 1923.

II. On June 15, 1923, the day of the receipt by Knauth, Nachod & Kuhne from the National City Bank of New York, of the check for $30,000, referred to in paragraph "3" of the reclamation petition of the claimant, Knauth, Nachod & Kuhne credited to the account of the claimant on the books of Knauth, Nachod & Kuhne, the sum of $30,000, the amount of said check, and also made an entry on its books that said claimant was entitled to interest on said sum of $30,000 from June 15, 1923. Thereafter the receiver and/or trustee of said Knauth, Nachod & Kuhne, in preparing a statement of the account of the claimant with Knauth, Nachod & Kuhne, as of the close of business on June 15, 1923, did include in said account interest for one day, to wit: interest on said sum of $30,000 for the day of June 15, 1923.

III. That Knauth, Nachod & Kuhne frequently from time to time in the regular course of their business with claimant, extending over a period of two years, received checks from New York banking institutions under circumstances substantially the same as those set forth in claimant's peti- [fol. 41] tion, and that in all such cases the practice above outlined with respect to the crediting and the allowance of interest on the $30,000 checks received from the National Bank of Commerce and the National City Bank of New York, respectively, was followed; that in all such cases and

in the transactions involving the aforementioned $30,000 checks, claimant had knowledge of the dates on which checks were instructed to be delivered to Knauth, Nachod & Kuhne in New York, and subsequently were notified of the dates of actual delivery.

IV. That Knauth, Nachod & Kuhne periodically sent to claimant statements of the latter's account with Knauth, Nachod & Kuhne, which statements set forth among other things sums credited to the account of claimant, the date of each credit, and a credit or credits for accrued interest computed upon sums credited from the dates of the credits aforementioned.

V. That on June 15, 1923, a check #11649 in the amount of $30,000 was received from Speyer & Co. by Knauth, Nachod & Kuhne for the account of claimant, and was credited by Knauth, Nachod & Kuhne to the account of claimant in the same manner as was employed in connection with the aforementioned checks received from the National Bank of Commerce and the National City Bank of New York.

VI. That on June 16, 1923, after the appointment and qualification of Middleton S. Borland as receiver of Knauth, Nachod & Kuhne, payment on said check was stopped, pursuant to instructions given by Speyer & Co.

[fol. 42] VII. That after the stoppage of payment on said check received from Speyer & Co. the credit to the account of claimant for the amount thereof appearing on the books of Knauth, Nachod & Kuhne, was reversed and the said sum of $30,000 was subtracted from the balance appearing on said books of Knauth, Nachod & Kuhne in favor of claimant.

VIII. All objections to the admissions in evidence of any fact or facts hereinabove stipulated are waived except objections on the ground of irrelevancy and/or immateriality.

IX. Nothing herein contained shall be deemed to limit the right of either party hereto to offer such other and further testimony and proof herein as said party may be advised, the sole purpose of this stipulation being to avoid

the necessity of producing common-law evidence to prove the truth of the facts herein stipulated to be true.

Dated New York, February 19, 1925.

Rosenberg & Ball, Attorneys for Trustee. Kellogg, Emery, Inness-Brown & Cuthell, Attorneys for Claimant.

[fol. 43] IN UNITED STATES DISTRICT COURT

In the Matter of KNAUTH, NACHOD & KUHNE, Bankrupt

Before Robert P. Stephenson, Esq., Special Master

MINUTES OF HEARINGS BEFORE SPECIAL MASTER

Hearing on Reclamation of Gebruder Röchling, Nov. 11, 1924, at 2 p. m.

Appearances of counsel omitted in printing.

Hearing adjourned sine die.

[fol. 44] [Title omitted]

Hearing on reclamation of Gebruder Röchling proceeded pursuant to adjournment, March 4, 1925, at 2 p. m.

Appearances of counsel omitted in printing.

Mr. Ernst: It is stipulated that the form of receipt referred to in paragraph 15 of the petition herein and annexed to the petition as Exhibit E thereof was submitted [fol. 45] to the bankrupts by the National Bank of Commerce, together with the check in the receipt referred to and under cover of instrument herewith offered in evidence as Claimant's Exhibit A.

(Received in evidence and marked Claimant's Exhibit A, March 4, 1925.)

Mr. Ernst: For the purposes of the record, the following facts are stipulated to be true:

"On June 15, 1923, the day of the receipt by Knauth, Nachod & Kuhne from the National Bank of Commerce of the check for $30,000, referred to in paragraph "3" of the

reclamation petition of the claimant, Knauth, Nachod & Kuhne credited to the account of the claimant on the books of Knauth, Nachod & Kuhne, the sum of $30,000, the amount of said check, and also made an entry on its books that said claimant was entitled to interest on said sum of $30,000 from June 15, 1923. Thereafter the receiver and/or trustee of said Knauth, Nachod & Kuhne, in preparing a statement of the account of the claimant with Knauth, Nachod & Kuhne, as of the close of business on June 15, 1923, did include in said account interest for one day, to wit: interest on said sum of $30,000 for the day of June 15, 1923.

On June 15, 1923, the day of the receipt by Knauth, Nachod & Kuhne from the National City Bank of New York, of the check for $30,000, referred to in paragraph "3" of the reclamation petition of the claimant, Knauth, Nachod [fol. 46] & Kuhne, credited to the account of the claimant on the books of Knauth, Nachod & Kuhne, the sum of $30,000, the amount of said check, and also made an entry on its books that said claimant was entitled to interest on said sum of $30,000 from June 15, 1923. Thereafter the receiver and/or trustee of said Knauth, Nachod & Kuhne, in preparing a statement of the account of the claimant with Knauth, Nachod & Kuhne, as of the close of business on June 15, 1923, did include in said account interest for one day, to wit: interest on said sum of $30,000 for the day of June 15, 1923.

That Knauth, Nachod & Kuhne frequently and from time to time in the regular course of their business with claimant, extending over a period of two years, received checks from New York banking institutions under circumstances substantially the same as those set forth in claimant's petition, and that in all such cases the practice above outlined with respect to the crediting and the allowance of interest on the $30,000 checks received from the National Bank of Commerce and the National City Bank of New York, respectively, was followed; that in all such cases and in the transactions involving the aforementioned $30,000 checks, claimant had knowledge of the dates on which checks were instructed to be delivered to Knauth, Nachod & Kuhne in New York, and subsequently were notified of the dates of actual delivery.

That Knauth, Nachod & Kuhne periodically sent to claim-
[fol. 47] ant statements of the latter's account with Knauth, Nachod & Kuhne, which statements set forth among other things sums credited to the account of claimant, the date of each credit, and a credit or credits for accrued interest computed upon sums credited from the dates of the credits aforementioned.

That on June 15, 1923, a check 11649 in the amount of $30,000 was received from Speyer & Co. by Knauth, Nachod & Kuhne for the account of claimant, and was credited by Knauth, Nachod & Kuhne to the account of claimant in the same manner as was employed in connection with the aforementioned checks received from the National Bank of Commerce and the National City Bank of New York.

That on June 16, 1923, after the appointment and qualification of Middleton S. Borland as receiver of Knauth, Nachod & Kuhne, payment on said check was stopped, pursuant to instructions given by Speyer & Co.

That after the stoppage of payment on said check received from Speyer & Co. the credit to the amount of claimant for the amount thereof appearing on the books of Knauth, Nachod & Kuhne, was reversed and the said sum of $30,009 was subtracted from the balance appearing on said books of Knauth, Nachod & Kuhne in favor of claimant."

Mr. Ernst: I move to strike out everything offered in evidence by the claimant herein as to transactions between the claimant and Lloyd's Bank, England, as between Lloyd's Bank, England, and the National Bank of Commerce and as
[fol. 48] to transactions between the claimant herein and the Swiss Banking Corp. and between the Swiss Bank Corp. and the National City Bank of New York, on the ground that none of such evidence is binding on the bankrupts herein. There is no proof of knowledge on their part as to what those transactions were and they are not chargeable with that information; therefore the testimony is irrelevant and immaterial.

The Master: What do you say to that?

Mr. Hotchkiss: I would say this—that it is in evidence, in one case certainly, that it was brought home to Knauth, Nachod & Kuhne that the transactions involved Lloyd's

Bank, England, and I think it is inferable from the evidence that is in, in the National City Bank case, that some other bank, name unknown, was involved. That being so, while I do not believe and do not argue that the anterior transactions in any way bind Knauth, Nachod & Kuhne, I think it is proper that they should be brought in to explain the fact that if Knauth, Nachod & Kuhne were put on notice or should have been put on notice, the fact or facts would have developed; that is, had they been bound to inquire further. I submit that if, as I argue, they were put on notice here, I think it is proper and necessary for me to show what they would have found if they had pursued the inquiry which I submit should have been made.

(Then followed oral argument.)

The Master: I will deny the motion.
Mr. Ernst: I take an exception.

Hearing closed. Decision reserved.
Briefs to be submitted.

[fol. 49] In United States District Court

[Title omitted.]

Opinion of the Special Master—May 12, 1925

Petition of Gebrueder Röchling for an order decreeing that the petitioners are entitled to a lien upon the money or securities in the hands of the Trustee in the amount of $60,000 with interest from June 15, 1923, and that the Trustee [fol. 50] be decreed to pay said sum with interest to the petitioners.

Kellogg, Emery, Inness-Brown & Cuthell, Esqs., for the petitioners.
Rosenberg & Ball, Esqs., for the trustee.

Stephenson, Special Master:

The petitioner is a co-partnership of Frankfort-on-Main, Germany. On May 4, 1923, the petitioner arranged with Lloyd's Bank, Ltd., London, for $30,000 to be delivered in

New York on June 15, 1923. On May 15, 1923, the petitioner arranged with Swiss Bank Corporation, London, for another $30,000 to be delivered in New York on June 15, 1923.

National Bank of Commerce in New York Check

On June 11, 1923, the petitioner instructed Lloyd's Bank Ltd., London, on the basis of the agreement of May 14, 1923, to deliver to them $30,000 in New York, and to procure that amount for them at Knauth, Nachod & Kuhne, New York. Prior to June 15, 1923, Lloyd's Bank Ltd. instructed the National Bank of Commerce in New York as follows:

"Pay 30,000 value fifteenth to Knauth, Nachod & Kuhne, New York for account of Rochling Bank, Gebt. Frankfort-on-Main."

On June 15, 1923, the National Bank of Commerce in New York delivered to Knauth, Nachod & Kuhne its cashier's check for $30,000, which read:

[fol. 51] "Pay to the order of Knauth, Nachod & Kuhne —$30,000. For account of Rochling Bank, Gebt. Frankfort-on-Main. Through The New York Clearing House."

The check was indorsed by Knauth, Nachod & Kuhne as follows:

"Pay to Guaranty Trust Co. or order. Jun. 15, 1923. Knauth, Nachod & Kuhne, New York, N. Y."

and on that day delivered to the Guaranty Trust Company, where Knauth, Nachod & Kuhne maintained a general checking account, and the amount of $30,000, being the amount of said check, was on that day credited by the Guaranty Trust Company to said account of Knauth, Nachod & Kuhne, and was collected by the Guaranty Trust Company through the New York Clearing House, after the petition in bankruptcy was filed against Knauth, Nachod & Kuhne, and after the Receiver was appointed. Upon receipt of this check by Knauth, Nachod & Kuhne on June 15, 1923, they gave a receipt to the National Bank of Commerce in New York for a cashier's check for $30,000 "for

account of Rochling Bank, Gebt. Frankfurt-On-Main, in accordance with instructions dated 6-11-23, received from London, England, Lloyd's Bank, Ltd. (Cox's Branch)." On June 15, 1923, Knauth, Nachod & Kuhne credited the account of the petitioner on their books with the sum of $30,000, and also entered on their books that the petitioner was entitled to interest on said $30,000 from June 15, 1923.

[fol. 52] National City Bank Check

On June 11, 1923, the petitioner requested Swiss Bank Corporation, London, to deliver to them $30,000. in New York on June 15, 1923, and to procure that amount for them at Knauth, Nachod & Kuhne, New York. On June 15, 1923, the National City Bank of New York delivered to Knauth, Nachod & Kuhne its cashier's check for $30,000, which read as follows:

"Pay to the Order of Knauth, Nachod & Kuhne, N. Y. $30,000 A/C Gebr. Rochling, Frankfort A/M. Payable only through New York Clearing House."

And Knauth, Nachod & Kuhne on that day gave the National City Bank a receipt in which they stated they had "Received from the National City Bank of New York $30,000. A/C Gebr. Rochling, Frankfort A/M." What, if any, instructions were given by the Swiss Bank Corporation to the National City Bank has not been shown. Knauth, Nachod & Kuhne indorsed the check received from the National City Bank of New York as follows:

"Pay to American Exchange National Bank or order. Jun. 15, 1923. Knauth, Nachod & Kuhne, New York, N. Y."

and on June 15, 1923, delivered this check to the American Exchange National Bank in which bank Knauth, Nachod & Kuhne maintained a general checking account, and the [fol. 53] amount of $30,000, being the amount of the said check, was on that day credited by the American Exchange National Bank to said account of Knauth, Nachod & Kuhne. This check was collected by the American Exchange National Bank through the New York Clearing House on June 16, 1923, after the petition in bankruptcy had been filed, and a Receiver of Knauth, Nachod & Kuhne had been ap-

pointed. On June 15, 1923, Knauth, Nachod & Kuhne credited the account of the petitioner on their books with said sum of $30,000, and also entered on their books that the petitioner was entitled to interest on said $30,000 from June 15, 1923.

Facts Applicable to Both Checks

In settling his accounts and liquidating the loans of Knauth, Nachod & Kuhne with the Guaranty Trust Company and the American Exchange National Bank, the Receiver received the benefit of both the above checks, and and there has come into his possession either cash or securities from each of said banks sufficient to cover each of the $30,000 checks.

In the regular course of business extending over a period of two years, between the petitioner and Knauth, Nachod & Kuhne, frequently and from time to time, Knuth, Nachod & Kuhne have received checks from New York banking institutions under circumstances substantially the same as the circumstances surrounding the receipt of the above checks. In all such cases the petitioner was credited with the amount of such checks on the day of their receipt, and was also [fol. 54] allowed interest on such amounts from the date of their respective receipts by Knauth, Nachod & Kuhne. The petitioner had knowledge of the dates on which checks were instructed to be delivered to Knauth, Nachod & Kuhne, and was subsequently notified of the dates of actual delivery. Knauth, Nachod & Kuhne periodically sent to petitioner statements of these amounts, which statements set forth the sums credited to the account of the claimant, the date of each such credit, and the credits for accrued interest computed upon the sums credited as aforesaid.

On June 15, 1923, Knauth, Nachod & Kuhne received a check for $30,000 from Speyer & Company for the account of the petitioner, and the petitioner's account was credited in the same manner. On June 16, 1923, after the appointment of a Receiver, payment was stopped on the Speyer & Company check, and thereafter the Receiver reversed such credit of $30,000 in favor of the petitioner and subtracted the same from the balance appearing on the books of Knauth, Nachod & Kuhne in favor of the petitioner.

The petitioner had no specific arrangement with Knauth, Nachod & Kuhne regarding the receipt by it of the particular checks involved in this reclamation proceeding. In determining the rights of the petitioner, it is immaterial what instructions Lloyd's Bank, Ltd. or the Swiss Banking Corporation gave to the banks in New York. What those instructions were, Knauth, Nachod & Kuhne did not know, and even if it did know what those instructions were, they [fol. 55] were not the instructions of the petitioner, but of London banks who stood in the relation to the petitioner of independent contractors.

The New York banks did not deliver to Knauth, Nachod & Kuhne either money or money immediately available, since the checks were payable through the New York Clearing House and the money would not be available until the day following. Therefore, by these checks the New York banks promised to pay Knauth, Nachod & Kuhne or order, the amounts therein specified on the day after their delivery. Knauth, Nachod & Kuhne were not agents to collect these checks, as the New York banks could not appoint them agents to collect from themselves. Neither did Knauth, Nachod & Kuhne receive these checks as their own property, and agree to pay the petitioner the amounts thereof. There was no contract between Knauth, Nachod & Kuhne and the New York banks for the benefit of a third person. As far as any dealings between Knauth, Nachod & Kuhne and the New York Banks are concerned, the checks and even the proceeds thereof when collected were to be held by Knauth, Nachod & Kuhne in trust for or as bailees for the petitioner. There was nothing in the arrangement between Knauth, Nachod & Kuhne and the New York banks which would authorize Knauth, Nachod & Kuhne to keep these checks, or even the funds when collected, as their own. If the New York banks, instead of delivering their checks had delivered gold bullion to Knauth, Nachod & Kuhne for account of the petitioner, such gold bullion would remain the property of the petitioner. Such was the holding in White v. The Miners National Bank, 102 U. S. 658. There the Miners National Bank delivered to [fol. 56] White a draft drawn on a third party which was endorsed as follows:

"Pay to S. W. White or order for account Miners National Bank, Georgetown, Colorado."

Concerning this endorsement, the Court states:

"It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain by the reasonable and almost necessary meaning of the language, in the indorser."

The Court then states that the effect of the indorsement was to make White the agent of the bank for the collection of the money. The first statement regarding the title of the paper or the ownership of the money when received applies to this case, but the second statement as to making White the agent of the bank for collection does not apply to this case. The New York banks did not make Knauth, Nachod & Kuhne agents to collect from themselves. The facts in this case are different from the White case, for in the White case, the draft was on a third party; in this case, the checks were the bank's own checks.

But the course of dealing between Knauth, Nachod & Kuhne and the petitioner shows that there was an agreement between them that Knauth, Nachod & Kuhne could at some time become the owner either of gold bullion or of checks delivered to them by New York banks, and immediately become a debtor to the petitioner for the amounts thereof. This course of dealing shows that the petitioner and Knauth, Nachod & Kuhne agreed that as soon as Knauth, Nachod & Kuhne received checks of New York [fol. 57] banks, they became the owners of the same, were entitled to sell them, and use the proceeds of such sale, and the petitioner was entitled to a credit for the amount of such checks, and to interest on the amount of such checks from the date of receipt by Knauth, Nachod & Kuhne. In this case, in accordance with that understanding, Knauth, Nachod & Kuhne did sell these checks to their banks on June 15, 1923, and received immediate credit therefor (Burton v. U. S., 196 U. S. 283). The fact that the petitioner had, for a period of two years, to its knowledge, accepted interest on such checks from the date of their receipt by Knauth, Nachod & Kuhne, and that Knauth, Nachod & Kuhne had, from such date, paid interest on said checks, and had the immediate use of the same, proves an intention

by the parties that Knauth, Nachod & Kuhne have the immediate ownership of such checks.

"If a man pays interest for money, he must be entitled to the use of it. When a man locks up money which is intrusted to him, in a box, he does not pay interest on it" (Cotton, L. J., in re Brood (1884), L. R., 13 Q. B. D. 740).

This case is not like the case of re Jarmulowsky, 249 Fed. 319, or National B. & D. Bank v. Hubbell, 117 N. Y. 384. In the Jarmulowsky case, depositors in a bank endorsed their checks in blank, and received immediate credit, but their pass books contained the notice that deposits of checks shall not be drawn against until collected. Evidence that a depositor had been permitted to draw against uncollected checks did not prove that he had a right so to draw. This was merely a privilege, and it could have been [fol. 58] retracted at any time. In this case, no such special agreement between Knauth, Nachod & Kuhne and the petitioner is shown, and therefore Burton v. United States, supra, applies. In National B. & D. Bank v. Hubbell, supra, checks were sent to Wilkinson & Company for collection, but were immediately credited to the depositor on the books of Wilkinson & Company before collection, and Wilkinson & Company remitted to the depositor each week the amount standing to its credit, whether or not the checks had been collected. This manner of doing business had been carried on for a number of years, and was the existing arrangement, but such course of business did not make Wilkinson & Company the owners of checks which were expressly sent for collection. In the case at bar, there was no arrangement between Knauth, Nachod & Kuhne and the petitioner that checks received by them were for collection and without such evidence and with the evidence of the course of business as above indicated, it follows that the contract between Knauth, Nachod & Kuhne and the petitioner was that Knauth, Nachod & Kuhne became the immediate owner of checks delivered to it by New York banks, and that the petitioner became an immediate creditor and entitled to interest. Furthermore, the petitioner specifically intended to have its credit with Knauth, Nachod & Kuhne increased by the amounts of these checks on June

15, 1923. Their instructions to the London banks were to procure these amounts of dollars for them at Knauth, Nachod & Kuhne, New York. This direction, connected with the fact that the petitioner carried an account to its credit with Knauth, Nachod & Kuhne, shows that the petitioner intended Knauth, Nachod & Kuhne to have title to the deposit made June 15, 1923, and that the petitioner have [fol. 59] credit for the same on that date. Therefore, in getting the credit on June 15, 1923, the petitioner got exactly what it intended to get.

My conclusion in this case accords with the reasoning applied by the courts to cases where paper is given a bank by a depositor for collection. This paper remains the property of the depositor; so would the money when collected, being the proceeds of the property of the depositor, remain the depositor's property. But from the course of dealing between the depositor and banker, the Courts find an agreement that when the money is collected, the bank takes title to the money and becomes a debtor to the depositor. Thus, in Commercial Bank v. Armstrong, 148 U. S. 50, the Court states as follows:

"The truth undoubtedly is that both parties understood that when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that the defendant would use the money in its business. Thus, the defendant was guilty of no wrong in using the money, because it had become its own."

In other words, the time when the bank becomes the owner and the depositor a creditor is the time that the parties understand that such change in their relationship shall occur. In paper given to a bank expressly for collection, it is understood the bank is not the owner of the paper, but the parties could agree that as to all paper delivered to a bank, it should become the immediate owner. The facts in this reclamation proceeding show that this is just what the parties intended.

For the above reasons, the petition herein should be dismissed.

Dated, May 12, 1925.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPEALED FROM

This matter having duly come on to be heard on May 22, 1925, upon motion of Rosenberg & Ball, attorneys for the Trustee herein, for an order confirming report No. 45 of the Special Master herein, now, upon reading and filing said report of the Special Master and the papers referred to therein and thereto annexed, and upon all of the proceedings had herein, it is, after due consideration, on motion of Rosenberg & Ball, attorneys for the Trustee herein,

Ordered that the said report of the Special Master be and the same hereby is in all respects confirmed, and the reclamation claim of Geber. Rochling be and the same hereby is dismissed; and it is

[fol. 61] Further ordered that the Trustee be and he hereby is authorized and directed to pay Robert P. Stephenson, as Compensation for his services as Special Master herein, $250.00, and that the Trustee recover from claimant herein, as costs and disbursements, the said $250.00, together with stenographer's fees of $5.40, and in addition thereto a docket fee of $20, amounting in all to $275.40, and have judgment and execution therefor; and it is

Further ordered that, for the purpose of effecting collection of said costs and disbursements, the Trustee be, and he hereby is, authorized to offset said amount against any dividend or dividends which may be declared herein in favor of said claimant.

Dated New York, May 27, 1925.

Augustus N. Hand, U. S. D. J.

[fol. 62] IN UNITED STATES DISTRICT COURT

OPINION OF JUDGE A. N. HAND GRANTING ORDER IN BANKRUPTCY

"I think the master is right. The only alternative is to hold that the relation of debtor and creditor would not arise until after the cashier's checks were collected but this is not

in accordance with the prior dealings of the parties and the customary allowance of interest from the date of the credit allowed. While the case is not free from doubt the petitioner in my opinion obtained a credit with Knauth, Nachod & Kuhne when the latter obtained the checks and allowed the credit. At that time the Bankrupts by the course of business became the owners of the checks and the customer the creditor of the bankrupts. See memorandum in Reclamation of Latzko & Popper, Inc. This Estate, February 17, 1925.

A. N. H., D. J.

[fol. 63] IN UNITED STATES DISTRICT COURT

STIPULATION RE APPEAL BOND

It is stipulated that no appeal bond shall be required.

Dated June 10, 1925.

Kellogg, Emery, Inness-Brown & Cuthell, Solicitors for Reclaimant. Office and P. O. Address: 120 Broadway, New York City. Rosenberg & Ball, Solicitors for Middleton S. Borland, Trustee in Bankruptcy, 74 Broadway, New York City.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court in the above entitled matter as agreed upon by the parties.

Dated New York, June 3, 1925.

Kellogg, Emery, Inness-Brown & Cuthell, Attorneys for Reclaimant. Rosenberg & Ball, Esqrs., Attorneys for Middleton S. Borland, Trustee in Bankruptcy.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] In United States Circuit Court of Appeals for the Second Circuit

In re Oscar L. Gubelman et al., Bankrupts

Ex Parte: Karl Röchling et al., Appellants; Middleton S. Borland, Trustee, Appellee

Before Hough, Manton and Hand, Circuit Judges

Opinion

Appeal from an order in bankruptcy of the District Court for the Southern District of New York dismissing the petition of the firm, Gebrueder Röchling, to reclaim the proceeds of two cheques which came into the possession of the trustee in bankruptcy.

Henry G. Hotchkiss for the appellants.
George G. Ernst for the Appellee.

Hand, Circuit Judge:

This case presents exactly the same situation, with a single exception to be noted, as existed in respect of the second cheque in In Re Gubelman, Ex parte Latzko & Popper, decided by this court on December seventh, 1925. There the cheque read, "Pay to the order of Knauth, Nachod & Kuhne, Favor of N. Latzko & Popper." Here one cheque read, "for account of Röchling Bank" and the other "a/c Gebt. Röchling." We held that "Favor of" was equivalent to "collect for," and it seems to us even plainer that "for account of" is as broad. Indeed this was the form of the cheque in White v. National Bank, 102 U. S. 658. If the drawer chooses to make the payee a fiduciary he establishes that relation when the payee accepts it, at least until the beneficiary repudiates it, or unless his ar- [fol. 67] rangements with the payee forbid. There can be no question that the drawer has limited the payee's free disposal of the cheque in the interest of another, and that is enough.

However, as we have just said, there is one difference between the case at bar and Ex parte Latzko & Popper. There the proof was that although the depositors' cheques were always at once credited to their account, their practise had been never to draw upon them until collection. Here the cheques were also credited at once, but it does not appear what the practise was as to drawing against them. As there was no agreement shown in either case to wait or not to wait until collection we regard any distinction as immaterial. In addition, not only were the items themselves at once credited, but interest upon them as well from the time of their receipt. This too we think immaterial. The immediate credit of such paper is itself evidence of the creation of a debt from the bank to its depositor, and on its face presupposes a purchase of the cheque. But such an entry will not control the form of the paper. We do not see that it adds anything of substance that interest has also been credited. Such entries are not kept in suspense or entered "short," but are reversed, if the item be dishonored. The trustee must indeed go so far, and does, as to say that if these cheques had been stopped, the claimants could notwithstanding have insisted upon drawing down their amount, because they were not endorsers. Yet this could not have been done if their face had been merely credited to the account. It appears to us that to make the added credit of interest so important is to deal in unrealities. When an account bears interest it is as natural to begin to credit interest at once as to credit the item at all. Any distinction seems to us gratuitious.

The cases do not help very much. In Beal v. Somerville, 50 Fed. Rep. 647, (C. C. A. 1), no interest was credited, nor [fols. 68 & 68a] was there an agreement that the depositor might draw at once. In First National Bank v. Armstrong, 40 Fed. Rep. 46, interest was indeed credited, but the credit was entered "subject to payment." National Butchers Bank v. Hubbel, 117 N. Y. 384, is closer, because although the bank did not credit interest, it remitted weekly, regardless of collections, relying upon its ability to reverse the entries, if any item were dishonored. That seems a stronger case for the assignee than this at bar is for the trustee.

In general we are disposed to make the form of the paper the test. We do not of course mean that an express agreement will not change what would otherwise be a trust into a debt. But it seems to us unreasonable to build up agreements, almost certainly factitious, upon the basis of the bank's bookkeeping, even when this on its face contradicts the legal results ascribed to the transactions. There must be better evidence of an agreement to change the intent otherwise imputed.

Order reversed; cause remanded with instruction to award the claimants a preferred claim on both cheques.

[fol. 69] In United States Circuit Court of Appeals

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

Judgment—Filed February 9, 1926

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded with instructions to enter an order in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H., L. H.

[fol. 70] [File endorsement omitted.]

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 26, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1980)

Office Supreme Court, U.
FILED
MAR 25 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—1925.

No. 10[redacted]34.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL BOCHLING, et al., trading as Gebrueder Bochling,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GODFREY GOLDMARK,
Counsel for Petitioner,
74 Broadway,
New York City.

Corporate Printing Co., 76½ Pine Street, New York City.

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Supreme Court of the United States

OCTOBER TERM—1925.

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, *Petitioner,* against CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING, *Respondents.*	Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Middleton S. Borland, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, respectfully shows:—

I.

Nature of Proceeding and Decision Below.

In the bankruptcy proceeding of Knauth, Nachod & Kuhne, an order of the United States District Court for the Southern District of New York confirming a Special Master's report disallowing a reclamation claim of the above respondents, Gebrueder Rochling, was reversed by the Circuit Court of Appeals for the Second Circuit and the reclamation claim allowed. The reclamation claim was to recover $60,000, the proceeds of two checks, which, it was alleged, had been traced into the possession of your petitioner as trustee in bankruptcy.

A reclamation petition, involving a similar question, was filed in the same proceeding by the Austrian banking house of N. Latzko and A. Popper, and cross-petitions for certiorari to review the decision of the Circuit Court of Appeals in that case is being presented by both the Trustee and the Claimant therein simultaneously herewith.

II.

Question of General Law Involved.

These cases involve an important question of general law. The question may be thus stated:

A. is a depositor having an account with *B.*, a bank.

A. instructs another bank, *C.* "to procure" a sum of money for *A.* at the *B.* bank on a given date.

Pursuant thereto and on said date, the *C.* bank delivers to the *B.* bank, the *C.* bank's cashier's check, for the amount in question, drawn to the order of the *B.* bank "for account of" *A.*

The amount of such check is forthwith credited to *A.'s* account with the *B.* bank, and in accordance with the well established practice between *A.* and *B.*, *A.* receives interest on the amount credited from the said date of the delivery of the check.

Question—In the absence of any special agreement between *A.* and the *B.* bank, does the *B.* bank under the above circumstances purchase the check and acquire title thereto and immediately become the debtor of *A.*, its depositor, or does the *B.* bank take the check merely as agent for collection, so that the proceeds of such check, if received by the *B.* bank after its bankruptcy, belong to *A.*, the depositor, and not to the Trustee in Bankruptcy?*

The Circuit Court of Appeals held in this case that the

* The facts of the present case appear in detail at page 8 of the annexed Brief.

bankrupts, who were the *B.* bank aforesaid, took a check as agents solely for collection where the check *on its face* was made payable to the bankrupts "for account of" *A.* (the respondents), and that, accordingly, where the check had not passed through the New York Clearing House until after the filing of the petition in bankruptcy, the Trustee in Bankruptcy held the proceeds as agent for the respondents and was obligated to pay such proceeds to the respondents as against general creditors.

In the *Latzko* case above referred to, in which a petition for a Writ of Certiorari is also being submitted, one of the checks was payable to the order of the bankrupts without more on its face but was *accompanied* by a communication that the check was "for account of" Latzko & Popper. In *that case,* the Circuit Court of Appeals held that the bankrupts took absolute title to the check and were not merely collection agents for Latzko & Popper.

The correctness of the decisions on both the Latzko and Rochling claims depends upon whether the doctrine of *White* v. *Miners National Bank,* 102 U. S. 658 applies, or whether, per contra, the use of the words "for account of" under the circumstances of the present case is not to be deemed a limitation but merely a designation of the account to be credited, thus amounting to an ordinary deposit within the principle of the well known case of *Burton* v. *United States,* 196 U. S., 283.

In the *Burton case,* it was held that where a depositor deposits a check of third parties with his bank and his account is credited therewith, the bank, in the absence of a special agreement to the contrary, is to be deemed a purchaser of the check and not a mere agent for its collection, with the result that from the moment of deposit the bank becomes a debtor to the depositor. In the *White* case it was said that where the payee of a draft *endorses* such draft to another person (not a bank) "for account of the payee", such other person is merely an agent for collection and not a purchaser of the instrument.

The Circuit Court of Appeals applied the doctrine of the *Burton* case to the situation arising in the *Latzko* claim and held the bankrupts there purchasers of the check, but refused to apply the *Burton* doctrine, and, on the contrary, applied the doctrine of the *White* case to the checks in the *Rochling* claim, because the words "for account of" appeared on the face of the check rather than in the accompanying instructions.

III.

Importance of the Question Presented.

Your petitioner submits that the questions presented are of great importance to the banking and commercial world, for the reason that banks throughout the country are daily receiving innumerable checks and drafts, domestic and foreign, to the order of such banks "for the account" of their depositors. Such transactions are constantly had as a means of making funds available at various points throughout the country, and your petitioner submits that it is of importance to have it determined authoritatively whether a bank receiving a check of another bank to the order of such first bank "for account of" a depositor of the first bank, is any the less a purchaser of such check or draft than it is where the depositor himself deposits a check for the credit of his own account. Your petitioner submits that this Court itself has recognized the great importance of commercial transactions of this character when, in discussing the effect of the words "for account of" in the *White* case it refrained from determining the effect of these words and said at page 661:

> "But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case."

IV.

Errors of the Circuit Court of Appeals.

Your petitioner submits that the conclusions reached by the Circuit Court of Appeals are untenable for two distinct reasons:

A.

The sole holding of the *White* case is that where the payee of a draft endorses the same to another person for account of the payee, that other person, the endorsee, receives the draft and collects it as agent and does not purchase the instrument. In the *White* case the endorsee, however, was not a bank and the endorsor had no "account" with the endorsee, for which "account" the endorsee could receive the check and to which its amount could be credited. In the present case, on the other hand, the recipient of the check is a bank with which the person for whose account the check was received had a general checking account, to which account it was the intention of all the parties that the proceeds of the check be credited. Furthermore, in the present case, the holding below results in the conclusion that the drawer or transmitting bank made the bankrupts its agents to collect the *drawer* bank's own check from *the drawer bank itself*—a wholly impossible result. Accordingly, it is obvious that the sole purpose of the words "for account of" in either the check or any accompanying instructions was to inform the bank which was the payee of the check whose account with it was to be credited with the amount of the check.

B.

In holding the bankrupts agents in the *Rochling* case where the words "for account of" appear on the face of the check, and in holding the bankrupts purchasers where

the same words appear in the accompanying instructions, the Court below erred because it wholly overlooked the fact that the reclamation claims here in both cases are presented by the respective *depositors* of the bank and are not claims by subsequent holders of the checks whose knowledge of the transaction is based wholly upon the form of the check and who would have taken such check subject only to the notice appearing thereon.

Your petitioner submits that as between the parties it is not the form of the checks but the actual arrangement between the depositor and the bank which must control in determining whether or not the bank is constituted the agent to collect the check, or whether it is a purchaser within the doctrine of the *Burton* case. Your petitioner submits further, that in the absence of other circumstances, the doctrine of the *Burton* case is as equally applicable to the facts here presented as to the ordinary case where the depositor himself rather than an agent bank deposits a check and is forthwith given credit therefor, with the result that the depositary bank becomes a purchaser forthwith.

Wherefore, in view of the fact that the decision below is untenable and that the important questions presented should be settled by this Court, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Judges of the United States Circuit Court of Appeals for the Second Circuit, demanding them to certify and send to this Court a transcript of the records and proceedings in this case, to the end that the decree of said Court may be reviewed, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

MIDDLETON S. BORLAND,
As Trustee in Bankruptcy of
Knauth, Nachod & Kuhne.

by Godfrey Goldmark
Counsel

State of New York,
County of New York, } ss.:

GODFREY GOLDMARK, being duly sworn, deposes and says as follows:

I am counsel for Middleton S. Borland, Trustee in Bankruptcy of Knauth, Nachod & Kuhne. I have read the foregoing petition and the same is true to my personal knowledge. The reason that this verification is made by me and not by said Borland is that the said Borland is at this time seriously ill and unable to transact any business or verify this petition.

GODFREY GOLDMARK.

Sworn to before me this
22nd day of March, 1926.

JOHN E. MCGUIRK,
Notary Public, Bronx County.
Certificate filed in New York County.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GODFREY GOLDMARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,
against
CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Facts.

The bankrupts were international bankers. The respondents were a private German bank and maintained a general account with the bankrupts at the time of the bankruptcy and for some time prior thereto (fols. 120-122).

The National Bank of Commerce Check.

On May 4, 1923, respondents purchased from Lloyd's Bank, Ltd., $30,000 payable in New York on June 15, 1923; and on June 11, 1923, respondents wrote to Lloyd's Bank, Ltd., and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" on June 15, 1923 (fols. 64-69, 159, 150).

Lloyd's Bank, Ltd., thereupon instructed the National Bank of Commerce in New York as follows (fol. 150):

> "Pay 30,000 value fifteenth to Knauth, Nachod & Kuhne, New York, for account of Rochling Bank, Gebt. Frankfort-on-Main."

Pursuant thereto and on June 15, 1923, during banking hours, the National Bank of Commerce delivered to the bankrupts its *Cashier's check* for $30,000 payable to the order of bankrupts "for account of Rochling Bank, Gebt. Frankfort-on-Main" (fol. 150). Bankrupts gave to the National Bank of Commerce a receipt for the check "for account of Rochling Bank, Gebt. Frankfort-on-Main, in accordance with instructions dated 6/11/23, received from London, England, Lloyd's Bank, Ltd." (fol. 153).

The National City Bank Check.

On May 15, 1923, respondents purchased from the Swiss Bank Corporation another $30,000 payable in New York on June 15, 1923; and on June 11, 1923, respondents wrote to Swiss Bank Corporation and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" on June 15, 1923 (fols. 85-90, 149-154).

The record does not show what, if any, instructions were given by the Swiss Bank Corporation to the National City Bank, but does show that on June 15, 1923, during the banking hours, the National City Bank delivered to the bankrupts its Cashier's check for $30,000 payable to the order of bankrupts, "a/c Gebr. Rochling, Frankfort A/M" (fol. 155). The form of receipt given by the bankrupts in this instance read: "Received from the National City Bank of New York $30,000 A/C Gebr. Rochling, Frankfort A/M" (fol. 155).

Steps Taken By Bankrupts Upon Receipt of the Checks.

On June 15, 1923 and immediately following the receipt by the bankrupts of the two checks, the bankrupts credited the account of the respondents for the amount of such checks. They also made an entry on their books that the respondents were entitled to interest on the $60,000 so credited from June 15, 1923 (fols. 117-119). The bank-

rupts on the same day—June 15th—deposited the National Bank of Commerce check with the Guaranty Trust Company where the bankrupts maintained a general checking account, and the amount of the check was on that day credited to the bankrupts' account (fol. 34). Likewise, on that day, the bankrupts deposited the National City Bank check with the American Exchange Bank where the bankrupts maintained a general checking account and the American Exchange Bank credited the bankrupts' account with the amount of said check forthwith upon its deposit (fol. 49).

Course of Dealing Between the Parties.

For several years prior to June 15, 1923, the bankrupts had received checks from New York banking institutions "for the account" respondents under circumstances substantially the same as just outlined in connection with the National Bank of Commerce and National City Bank checks (fol. 137). In all such instances checks so received were treated as cash deposits and respondents' account on the books of the bankrupts was credited forthwith on the receipt of such checks with the amounts thereof, and interest was allowed respondents on such deposits from the dates of the credits (fol. 38). This practice was known to, and acquiesced in, by respondents. They periodically received statements from the bankrupts showing that in all cases credits had been given upon receipt of checks and interest allowed from the dates of the credits. These statements rendered to respondents by the bankrupts were accepted by respondents without question (fols. 159-160).

Payment of the Checks to the Receiver in Bankruptcy.

The bankruptcy petition was filed in the Clerk's office on the morning of June 16, 1923, and on that day, the checks of the National Bank of Commerce and of the National City Bank were paid respectively to the Guaranty Trust

Company and to the American Exchange National Bank through the New York Clearing House. Thereafter, the Guaranty Trust Company and the American Exchange Bank liquidated collateral loans and returned the surplus to the receiver (fols. 54, 55). It is against these funds that the respondents assert their reclamation rights on the ground that the surplus includes the proceeds of the two checks in question which were collected and held by the Receiver as agent for the respondents.

POINT I.

The words "for account of" Rochling appearing on the face of the checks were a mere designation of the "Account" on the Bankrupts' books to be credited and were not restrictive words making the Bankrupts merely the agents of the drawer banks for collection from themselves.

The substance of the argument below was that the words "for account of" Rochling appearing on the face of the checks are restrictive words, having the same effect as though the checks had been endorsed for collection, and that as a result, title to the checks did not pass to the bankrupts on June 15th.

This argument was based upon a line of cases which hold that an *endorsement* by a payee to a third party "for collection" or "for account of" is restrictive and constitutes the endorsee an agent merely for collection.

The error in this argument lies in the assumption that these cases are applicable to the situation here presented and that the words "for account of" as used on the checks here under consideration were intended to have the same meaning, despite the fact that it appears that the Rochlings had a checking account with the bankrupts and desired a credit on June 15th, the day upon which the checks were received by the bankrupts.

It is submitted that in the light of the situation here presented, the natural and reasonable interpretation of the words "for account of" completely negatives the construction adopted below and affirmatively shows that the words were used merely as an identification of the account on the bankrupts' books which was to be credited, and that the intention of all the parties was that the checks were received as cash deposits.

While there are numerous cases holding that an *endorsement* "for collection" or "for account of" a third party is restrictive, the main authority relied upon is the decision of this Court in *White* v. *National Bank,* 102 U. S., 658.

In the *White* case, the defendant bank, by its president, J. L. Brownell, endorsed drafts to the plaintiff White, in the following manner:

> "Pay S. V. White or order for account Miners' National Bank, Georgetown, Colorado. J. L. Brownell, p't."

Brownwell received from White for the use of the bank the amount of the drafts less a discount. The drafts not having been paid at maturity, White sued the bank both as endorser and for money paid by him to the use of the bank.

This Court *decided* that the plaintiff might recover for money paid to the defendant's use. In *commenting* upon the form of the endorsement, however, Mr. Justice MILLER, writing for the Court, said at page 661:

> "It seems to us that the court below correctly construed the effect of the endorsement to be to make White the agent of the bank for the collection of the money."

It is upon this *dictum* that respondents rely so greatly. But in the *White* case the defendant had no bank account with White for which "account" White received the drafts and to which "account" the amounts of the drafts were to

be credited. Moreover, the drafts were drawn on third parties, and endorsed to White by the bank for its own account. The natural and reasonable construction of the endorsement was that the bank had constituted White an agent to collect the drafts from the third parties. That White was cognizant of this appears quite clearly from the fact that he did not seek to *explain* the words, his only effort being to *contradict them and deny them any meaning* through parole proof of a separate and distinct agreement alleged to have been made at the time of the endorsement and transfer of the drafts (see page 660 of the opinion).

In the present case there is no such attempt to disregard the words "for account of" or to deny them meaning. Petitioner's position on the contrary is that when the words are interpreted in the light of the circumstances attendant upon the delivery of the checks to the bankrupts, it clearly appears that the words were nothing more than a designation of "the account" on bankrupts' books entitled to be credited—an every day transaction.

Here respondents had an ordinary checking account with the bankrupts. The checks in question were delivered to the bankrupts, not by respondents, but by third parties, the National Bank of Commerce and the National City Bank. The bankrupts would not have known which account on their books was to be credited with the amounts of the checks unless the banks had notified them in that regard at the time of the making of the deposits. Moreover, here the checks were not drawn on third parties *but were cashier's checks drawn on the banks themselves.* In the case of the National Bank of Commerce check, the words "for account of" were part of the printed matter (fol. 72), thus making more obvious the fact that this was a stereotyped form for purposes of identification and not contemplated as a basis for a special agreement restricting the negotiability of the paper. The situation was wholly dissimilar from that in the *White* case where this Court

because of the commercial importance of the question, refrained from unnecessarily passing on the effect of the words "for account of."

To hold under the present circumstances that the words "for account of" were used to give the bankrupts necessary information as to the account on their books to be credited, is reasonable and intelligent. To hold that the words made the bankrupts agents to collect, is to place upon those words an unreasonable and unnatural construction, for *any such construction would mean that the very banks instructed to pay monies to the bankrupts for the respondents had constituted the bankrupts their agents to collect those very same monies from the banks themselves. A far-fetched and unwarranted interpretation wholly contrary to established commercial practices.*

Furthermore there is one further important set of facts present in the case at bar which shows conclusively that the National Bank of Commerce and the National City Bank did not intend to constitute the bankrupts agents to collect. Appellants' instructions to Lloyds Bank, Ltd., and to the Swiss Bank Corporation were, in each instance, *"to procure" $30,000 for appellants at Knauth, Nachod & Kuhne on June 15, 1923* (fol. 67, 88). What instructions Swiss Bank Corporation gave to the National City Bank, appellants failed to show. But they did introduce into evidence the instructions from Lloyds Bank, Ltd., to the National Bank of Commerce. Those instructions were as follows (fol. 70):

> *"Pay* 30,000 value *fifteenth* to Knauth, Nachod & Kuhne New York for account of Rochling Bank Gebt. Frankfort-on-Main."

And bankrupts' acknowledgment of receipt of the National Bank of Commerce check acknowledges receipt thereof "in accordance with" said instructions (fol. 79). Presumably similar instructions went forward from Swiss Bank Corporation to the National City Bank.

In other words respondents as is usually the case had contracted for *money to be placed at their disposal with the bankrupts on June 15th* and the New York banks had been instructed *to pay said sums of money to the bankrupts on June 15th.* It was the intention of the respondents to obtain *credits with the bankrupts on June 15th.* The duty of the New York banks was to fulfill the obligations of their correspondents, Lloyd's Bank, Ltd., and Swiss Bank Corporation, namely, to establish the *credits* desired by the respondents. It was not their duty nor did they have any authorization to deposit a check for collection by the bankrupts. Their obligations was to *pay on a day certain*—June 15th, 1923. Accordingly, on June 15th, the banks presented their Cashier's checks to the bankrupts and at the same time identified the particular account to which the amounts of the checks were to be credited. They said in effect to the bankrupts: "We are instructed to pay you $30,000 today for the account of appellants. Here is our cashier's check to accomplish that purpose." And the only way such tender could accomplish payment on June 15th and thus secure for respondents *the very credit they had bargained for,* was through the *purchase of the checks by the bankrupts and the crediting forthwith of respondents account* on the bankrupts' books. Of course, the banks knew perfectly well that under well established banking practices that was exactly what would be done; that the bankrupts would, as indeed they did, treat the transaction as a cash deposit.

For the Court to construe these deposits as deposits for collection would be to construe the acts of the banks as a deliberate breach of instructions. But to construe the words "for account of" as an identification of the account to be credited, and hence not a bar to the purchase of the checks by the bankrupts, is to treat the acts of the banks as a compliance with their instructions and as a fulfillment of the contracts made by Lloyd's Bank, Ltd., and Swiss Bank Corporation with appellants. It is a con-

struction which gives respondents the credit with bankrupts on June 15, 1923, for which they bargained.

In this connection it is to be remembered that in determining whether or not the checks were deposited for collection, it is the intent of the depositors, *i. e.,* the banks, and the bankrupts, that is controlling.

As was said in *Fifth National Bank* v. *Armstrong,* 40 Fed., 46, at page 49:

> "The true criterion * * * is whether the depositor intended to part with title, and whether the receiving bank intended to purchase the paper, and assume the risk of payment, and give an absolute credit therefor, as in cases of discount."

The *White* case presents no set of circumstances such as those above outlined and analyzed. Its doctrine may be sound law when applied to cases resembling it in fact but it is wholly distinguishable from and completely inapplicable to the present situation. This Court, it is submitted, should authoritatively determine the soundness of the *dictum* contained therein and also its application to the facts here disclosed.

POINT II.

When the two cashier's checks were received by the Bankrupts on June 15th prior to the bankruptcy and Respondents' account credited with the amount thereof, title to the checks passed to the Bankrupts and the Respondents on that day became mere general creditors.

As it has been shown that the cashier's checks of the two banks were not delivered to the bankrupts "for collection" from the banks themselves, it must follow that the general rule laid down in *Burton* v. *United States,*

196 U. S., 283, is applicable, and that when the bankrupts received the checks and credited respondents' account, title to the checks passed to the bankrupts and the respondents became forthwith mere general creditors.

The Rule of the Burton Case.

In *Burton* v. *U. S.*, 196 U. S., 283, Burton had deposited a check in a bank where he had a general account and the bank had credited him with the amount of the check forthwith upon deposit. This Court squarely held that, in the absence of any special agreement to the contrary, title to the check passed to the bank upon delivery of the check and credit being given therefor. Mr. Justice PECKHAM writing for the Court said (at p. 297):

> *"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof.* The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. *In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check* from the trust company upon which it was drawn."

The New York courts have enunciated the same rule. In *Craige* v. *Hadley*, 99 N. Y., 131, Judge ANDREWS, speaking for the Court said (p. 133):

> "The general doctrine that upon a deposit being made by a customer in a bank in the ordinary course of business, of money, or of drafts or *checks received and credited as money,* the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question."

And in *Metropolitan National Bank* v. *Loyd,* 90 N. Y., 530, Judge DANFORTH, said at page 535:

> "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it and the bank gave Murray credit for the amount and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank."

That the receipt of interest by the respondents on June 15th is inconsistent with the theory of a deposit "for collection" and is proof that the bankrupts purchased the checks and that the respondents were merely general creditors, appears from the following cases:

Upshur v. *Briscoe,* 138 U. S., 365, 375;
Pittsburg Nat'l Bank of Commerce v. *McMurray,* 98 Pa., 538;
Ames, *Cases on Trusts* (2nd Ed., 1893), page 33, note 1.

If the crediting on June 15th of the respondents' account by the bankrupts meant anything, it meant that the respondents were entitled, as a matter of right, to draw against the credit at any time. This is precisely the right which the respondents desired, for they had instructed Lloyds Bank in the one case and the Swiss Bank Corporation in the other case, "to procure this amount for us at Knauth, Nachod & Kuhne, New York, on June 15, 1923." There instructions were carried out in the usual

way, and the mere fact that the checks on their face indicated whose account was to be credited, can in no wise alter the rule laid down in the *Burton* and New York cases above referred to, which now has become the well recognized rule in the Federal and New York State Courts.

In the absence of any agreement to the contrary and in the light of the instructions, it is submitted that this rule is applicable here and that the court below erred in finding that the bankrupts took the checks as agents or fiduciaries, with the result that title did not pass prior to the bankruptcy. The rule of the *Burton* case has become well established and should in the absence of special agreement be held applicable to the every day banking transactions here involved.

POINT III.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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FILED
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CLERK

No. [redacted] 34

Supreme Court of the United States

OCTOBER TERM, 1926.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, *et al.*, trading as Gebrueder Rochling,

Respondents.

BRIEF FOR PETITIONER

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20 F.(2d) p. 746

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Brief of the Argument.

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Supreme Court of the United States.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING,

Respondents.

BRIEF FOR PETITIONER.

Previous Opinions in the Present Case.

The report of the Special Master, recommending the disallowance of the respondents' reclamation claim filed in the bankruptcy proceedings of Knauth, Nachod & Kuhne, appears on page 24 of the Record and is reported in 6 A. B. R. (n. s.) 460. The District Court affirmed the Special Master's report and its opinion is found on page 32 of the Record and is reported in 6 A. B. R. (n. s.) 460. The opinion of the Circuit Court of Appeals reversing the District Court and allowing respondents' claim appears on page 34 of the Record and is reported

in 10 Fed. (2d) 935, under the name of *In re Gubelman*. That opinion is in part based upon the same Court's opinion in *Ex parte Latzko & Popper*, 10 Fed. (2d) 926. The latter case is also before this Court upon two writs of *certiorari* in Nos. 337 and 338.

Ground for Jurisdiction.

The case is before this Court by reason of a writ of *certiorari* which on April 26, 1926, was granted under Judicial Code, Section 240, paragraph (a), amended by the Act of February 13, 1925, to review a judgment of the Circuit Court of Appeals for the Second Circuit (R., 36).

The Question Presented.

Respondents seek to reclaim the proceeds of two checks which passed through the New York Clearing House after the filing of the petition in bankruptcy. The facts are undisputed, and the question of law presented is whether the bankrupts had become owners of the checks prior to the filing of the petition or whether on that date the bankrupts held the checks for collection. If the former, the respondents are only general creditors and the judgment of the Circuit Court of Appeals must be reversed.

Statement of Facts.

The bankrupts were private international bankers in New York City. The respondents are bankers in Frankfort, Germany (R., 15). They maintained a general deposit account in New York with the bankrupts at the

time of the bankruptcy and had done so for a period of over two years prior thereto (R., 22).

The National Bank of Commerce Check.

On May 14, 1923, respondents purchased from Lloyd's Bank, Ltd., $30,000 *payable in New York on June 15, 1923*; and on June 11, 1923, respondents wrote to Lloyd's Bank, Ltd., and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" *on June 15, 1923* (Exs. A and B, R., 12, 13). Lloyd's Bank, Ltd., thereupon instructed the National Bank of Commerce in New York as follows (Ex. C. R., 13):

> "Pay 30,000 *value fifteenth* to Knauth, Nachod & Kuhne, New York for account of Rochling Bank, Gebt. Frankfort-on-Main."

Pursuant thereto and on June 15, 1923, during banking hours, the National Bank of Commerce delivered to the bankrupts its Cashier's check (Ex. D. opp. R. 12), for $30,000 payable to the order of bankrupts "for account of Rochling Bank, Gebt. Frankfort-on-Main" (R. 21). Bankrupts gave to the National Bank of Commerce a receipt for the check "for account of Rochling Bank, Gebt. Frankfort-on-Main, in accordance with instructions dated 6/11/23, received from London, England, Lloyd's Bank, Ltd" (Ex. E. R. 13).

The National City Bank Check.

On May 15, 1923 (Ex. G, R. 15), respondents purchased from the Swiss Bank Corporation another $30,000 also

payable in New York *on June 15, 1923;* and on June 11, 1923, respondents wrote to Swiss Bank Corporation and requested that bank "to procure this amount" ($30,000) "for us at Knauth, Nachod & Kuhne, New York" *on June 15, 1923* (Ex. H., R. 15).

The Record does not show what, if any, instructions were given by the Swiss Bank Corporation to the National City Bank, but does show that on June 15, 1923, during banking hours, the National City Bank delivered to the bankrupts its Cashier's check (Ex. I., R. 22), for $30,000, payable to the order of bankrupts, "A/C Gebr. Rochling, Frankfort A/M" (R. 22). The form of receipt given by the bankrupts in this instance read: "Received from the National City Bank of New York $30,000 A/C Gebr. Rochling, Frankfort A/M" (R. 13).

Steps Taken by Bankrupts Upon Receipt of the Checks Here Involved.

On June 15th, 1923, and immediately following the receipt by the bankrupts of the checks from the National Bank of Commerce and the National City Bank, the bankrupts, in accordance with the usual practice hereafter referred to, credited the account of respondents with the amounts of the checks. *They also made an entry on their books that respondents were entitled to interest on the $60,000 so credited from June 15, 1923* (R. 21, 22).

Thereafter on June 15, 1923, the Bank of Commerce check was deposited by the bankrupts in the Guaranty Trust Company where the bankrupts maintained a general checking account; and on the same day the National City check was deposited by the bankrupts in the Amer-

ican Exchange National Bank where the bankrupts also maintained a general checking account (Ex. D and I, Opp. R. 12 and 14). Said two banks on June 15, in turn credited the respective amounts of said checks to the accounts of the bankrupts (Petition paragraphs 17 and 39, R. 5 and 9, not denied).

Course of Dealing Between Respondents and Bankrupts.

THE RECORD CONTAINS THE FOLLOWING STIPULATED FACTS (R., 22) AS TO THE PRIOR DEALINGS BETWEEN THE PARTIES:

> "THAT KNAUTH, NACHOD & KUHNE FREQUENTLY AND FROM TIME TO TIME IN THE REGULAR COURSE OF THEIR BUSINESS WITH CLAIMANT, EXTENDING OVER A PERIOD OF TWO YEARS, RECEIVED CHECKS FROM NEW YORK BANKING INSTITUTIONS UNDER CIRCUMSTANCES SUBSTANTIALLY THE SAME AS THOSE SET FORTH IN CLAIMANT'S PETITION, AND THAT IN ALL SUCH CASES THE PRACTICE ABOVE OUTLINED WITH RESPECT TO THE CREDITING AND THE ALLOWANCE OF INTEREST ON THE $30,000 CHECKS RECEIVED FROM THE NATIONAL BANK OF COMMERCE AND THE NATIONAL CITY BANK OF NEW YORK, RESPECTIVELY, WAS FOLLOWED; THAT IN ALL SUCH CASES AND IN THE TRANSACTIONS INVOLVING THE AFOREMENTIONED $30,000 CHECKS, CLAIMANT HAD KNOWLEDGE OF THE DATES ON WHICH CHECKS WERE INSTRUCTED TO BE DELIVERED TO KNAUTH, NACHOD & KUHNE IN NEW YORK, AND SUBSEQUENTLY WERE NOTIFIED OF THE DATES OF ACTUAL DELIVERY.
>
> THAT KNAUTH, NACHOD & KUHNE PERIODICALLY SENT TO CLAIMANT STATEMENTS OF THE LATTER'S ACCOUNT WITH KNAUTH, NACHOD & KUHNE, WHICH STATEMENTS SET FORTH AMONG OTHER THINGS SUMS

CREDITED TO THE ACCOUNT OF CLAIMANT, THE DATE OF EACH CREDIT, AND A CREDIT OR CREDITS FOR ACCRUED INTEREST COMPUTED UPON SUMS CREDITED FROM THE DATES OF THE CREDITS AFOREMENTIONED."

The Filing of the Petition in Bankruptcy and Transactions Occurring Thereafter.

On the morning of June 16th, 1923, the day after the receipt of the checks by bankrupts and their deposit with the Guaranty Trust Company and the American Exchange National Bank, the petition in bankruptcy herein was filed. The checks were paid to the Guaranty Trust Company and the American Exchange National Bank through the New York Clearing House on the morning of June 16th, after the filing of the bankruptcy petition (Petition R. 9 and 10, not denied).

Thereafter the Guaranty Trust Company and American Exchange National Bank liquidated collateral loans made to the bankrupts prior to the filing of the petition, and turned over to the Receiver a surplus of cash and securities remaining after such liquidation (Petition R., 7 and 11 not denied). It is against these funds that respondents assert their reclamation rights.

The Decision Below.

The Special Master and the District Court denied the respondents' petition on the ground that title to the checks had passed to the bankrupts on June 15th and that on that day respondents became general creditors. The Circuit Court of Appeals, however, reversed the decision of the District Court and held, in effect, that the checks

were received by the bankrupts in a fiduciary capacity until collected, and that as they were not collected until after the bankruptcy the proceeds did not become a part of the general assets of the estate.

BRIEF OF THE ARGUMENT.

The petitioner contends:

I

That as between the bankrupts and their customers, the respondents, the capacity in which the bankrupts received checks, deposited by third parties "for account of" the respondents, depends upon the intention of the bankrupts and the respondents. In the present case the evidence is clear that their intention was that title to such checks should pass to the bankrupts upon their receipt by the bankrupts, and that contemporaneously therewith the bankrupts should establish a credit in favor of the respondents for the amount of such checks and thus become generally indebted.

A. That there is a general presumption in favor of the existence of a debtor-creditor relationship.

Foley vs. *Hill*, 2 H. L. 28;
Bank of Republic vs. *Millard*, 10 Wall., 152;
Burton vs. *United States*, 196 U. S., 283;
Cragie vs. *Hadley*, 199 N. Y., 131;
Metropolitan National Bank vs. *Loyd*, 90 N. Y. 530;
City of Douglas vs. *Federal Reserve Bank*, 46 Sup. Ct., 554, 70 L. Ed., 620.

B. That in the present case petitioner has offerred convincing affirmative evidence supporting the presumption of the existence of a debtor-creditor relationship.

(a). That the crediting of respondents' account immediately on the bankrupts' receipt of the checks and the allowance of interest from that date is almost conclusive evidence of the existence of a debtor-creditor relationship.

Upshur vs. *Briscoe*, 138 U. S. 365;
Pittsburgh National Bank of Commerce vs. *McMurray*, 98 Pa., 538;
Ames, Cases on Trusts (2nd Ed., 1893), page 33, note 1.

C. That there is no evidence in the record controverting the existence of a debtor-creditor relationship.

II

The words "for account of" on the face of the checks delivered to the bankrupts by the National City Bank and the Bank of Commerce were merely for the purpose of informing the bankrupts on whose account the money was being paid. They were not intended to and could not determine or vary the nature of the relationship existing *as a fact* between the respondents and the bankrupts. The beneficial title to the checks upon their re-

ceipt must be determined by the arrangements between the bankrupts and the respondents and not by the acts of third parties.

A. That the court below erred in concluding that the words "for account of" in the present case, though used by third parties (the New York banks) must determine the rights, not of those third parties whose rights are not in question, but of two other parties, the bankrupts and the respondents, irrespective of what in fact is the actual relationship of those two parties as a result of their own arrangements.

B. That the court below erred in concluding that the words "for account of" must always have the same meaning irrespective of the circumstances in which they are used.

(a). The New York banks in delivering their checks to the order of the bankrupts "for account of" respondents did not *intend* to constitute the bankrupts agents for collection.

(b). The inapplicability of *White* vs. *Miners National Bank* and similar cases.—Endorsement for account of *endorser* distinguished from endorsement for account of *third party.*

New York Negotiable Instruments Law, Secs. 66 and 67 (Uniform Act Secs. 36 and 37);

Hook vs. *Pratt,* 78 N. Y., 381.

(c). Extrinsic circumstances may be examined to determine the meaning of a term as used under the circumstances no matter how well known and definitely decided its common meaning.

United States vs. *Bethlehem Steel Co.*, 205 U. S., 105;
Middleworth vs. *Ordway*, 191 N. Y., 404;
Price vs. *United States*, 269 U. S., 492.

(d) The parole evidence rule is not binding on persons not parties to the written instrument.

Central Coal & Coke Co. vs. *Good & Co.*, 120 Fed., 793, 799, and cases there cited.

C. The Court below erred in concluding that since the appearance on the face of the checks of the words "for account of" might affect the bankrupts' power of disposing of the checks, that fact is material in determining the relationship between the bankrupts and the respondents and the capacity in which the bankrupts received the checks.

D. The court below erred in failing to find as a fact the existence of an agreement between the bankrupts and the respondents that a debtor-creditor relationship was to exist, although it admitted that irrespective of the form of the checks such an agreement would be controlling.

III.

That in transactions between banks, such as those here involved, the strongest evidence should be required of that party who asserts that the relationship between a banker and its depositor is other than the ordinary one of debtor-creditor—a relationship which is essential for the conduct of modern banking. That only by clear and convincing proof should the burdens of a fiduciary relationship be imposed upon a banker. That the respondents here have wholly failed to meet the burden which was theirs.

POINT I.

As between the bankrupts and their customers, the respondents, the capacity in which the bankrupts received checks, deposited by third parties for account of the respondents, depends upon the intention of the bankrupts and the respondents. In the present case, the evidence is clear that their intention was that title to such checks should pass to the bankrupts upon their receipt by the bankrupts, and that contemporaneously therewith the bankrupts were to establish a credit in favor of the respondents for the amount of such checks and thus become generally indebted.

A. General Presumption in Favor of a Debtor-Creditor Relationship.

Of course the relationship ordinarily existing between a bank or banker and depositor is that of debtor and

creditor, and not principal and agent or trustee and *cestui*. Since the leading cases of *Foley* vs. *Hill*, 2 H. L. 28, and *Bank of Republic* vs. *Millard*, 10 Wall. 152, this relationship has been recognized. In the latter case, this Court said:

> "It is an important part of the business of banking to receive deposits, but when they are received *unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys.* The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of *Foley* vs. *Hill*, 2 Clark & Finnelly, 28, and they all concurred in the opinion that the *relation between a banker and customer, who pays money into the bank,* OR TO WHOSE CREDIT MONEY IS PLACED THERE, *is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character,* and the great weight of American authority is to the same effect."*

Whether, therefore, the *depositor* sends *money* to his banker, or money is sent *for his account* by third parties, by the depositor's direction or with his knowledge, the title to the money passes to the banker and simul-

*Italics throughout are inserted by counsel.

taneously therewith there springs up a debtor and creditor relationship between the banker and his depositor.

The foregoing general rule of *Foley* vs. *Hill* and *Bank of Republic* vs. *Millard* as to the effect of the deposit of *money* by the depositor himself has been extended by the leading cases in this Court and in New York to the deposit of *checks* and other instruments by the depositor himself where the deposit has not been made under special circumstances or in pursuance of a special agreement showing that a different relationship, in fact, was *intended* to be created. Thus in *Cragie* vs. *Hadley*, 99 N. Y., 131, quoted with approval by this Court in *Burton* vs. *United States* (1905), 196 U. S., 283, at 302, the New York Court of Appeals said:

> "The general doctrine that upon a deposit being made by a customer, in a bank, in the ordinary course of business, of money, *or of drafts or checks received and credited as money*, the title to the money, *or to the drafts or checks*, is immediately vested in and becomes the property of the bank, is not open to question. (*Commercial Bank of Albany* vs. *Huges*, 17 Wend., 94; *Metropolitan Nat. Bank* vs. *Loyd*, 90 N. Y., 530). The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

In *Metropolitan National Bank* vs. *Loyd*, 90 N. Y., 530, quoted with approval in the *Burton* case, the New York Court of Appeals said:

> "It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. * * * If, as the appellant insists, the check had been deposited for a specific purpose—for collection, the property would have remained in the depositor, *but there is no evidence upon which such fact could be established, nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.*
>
> "These show that it was the *intention* of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it, as Murray's agent."

In the *Burton* case (1905), 196 U. S., 283, the doctrine

of the foregoing cases was approved, and this Court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. * * * There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated."

And further:

> "There was no agreement or undertaking of any kind other than such as the law makes from the

> transaction detailed, which was itself proved by uncontradicted evidence offered by the Government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but the act of an owner in regard to its own property."

The doctrine of the foregoing cases has recently been applied by this Court in *City of Douglas* vs. *Federal Reserve Bank of Dallas* (June 1, 1926), 46 Sup. Ct., 554, 70 L. Ed., 620.

Since the rule that the deposit of *money* by the bank's customer in the absence of a special agreement creates a debtor-creditor relationship has been extended to cases where *checks* are deposited by that customer, there is no reason why the same rule when applied to *money* deposited by third persons for the account of the depositor, should not likewise be extended to the deposit of *checks* by such third persons, *particularly when made pursuant to the depositor's direction as in the present case.*

The true test must be in all cases: Is there any evidence to show that as between banker and depositor a different relationship was intended to be created.

Of course, varying circumstances have been held sufficient to indicate that the relationship between banker and depositor was not *intended* to be that of debtor and creditor upon the deposit of checks, and that the relation-

ship was *intended* to be that of bailor and bailee, or principal and agent. Thus when a payee of a check *endorses* it to his banker "*for collection and credit,*" these words indicate that the payee-endorsor does not intend to deposit the check, but intends only to constitute the banker his agent for collection and intends that the amount thereof should only be credited to depositor's account when the instrument is collected, but that then and then only should the relation of debtor and creditor arise.

All of this is well established law, as are the decisions of the Courts in the numerous cases relied upon by the respondents, all to the effect that by endorsements in varying restrictive forms, the payee-endorsor does not *intend* to divest himself of title to the instrument, but intends to constitute the endorsee his agent for the purpose solely of collecting the check for the endorsor's account. *In other words, as between endorsor and endorsee, the words of restrictive endorsement are held to indicate the* INTENT *not to transfer beneficial title.*

Those cases are wholly inapplicable to the present situation. Here the legal relationship between the bankrupts and the respondents with respect to the checks must depend not upon the mere chance that the same words were used here by third parties—The City Bank and the Bank of Commerce—as are ordinarily used by endorsors to create an agency relationship, but must depend upon the intention of the bankrupts and the respondents, as evidenced not by the acts of third parties, but by their own prior acts in the light of the essential relationship existing between them.

Inasmuch as ordinarily, the relationship between bank-

er and depositor is that of debtor and creditor, the burden of proof is upon the respondents here to establish that some other relationship, such as principal and agent, existed. Here, however, *there is no evidence of a special agreement or that the relationship was other than ordinarily and presumptively exists,* or that the respondents intended to constitute the bankrupts their agents to collect checks sent to the bankrupts "for the respondents' account" (except *only* the chance use of the words "for account of" by the third party banks, the use of which will be discussed in the next Point). *In fact, the contrary appears without contradiction!*

B. Affirmative Evidence Supporting Presumption of Intention to Create Debtor-Creditor Relationship.

Respondents were foreign bankers; they had credits in Pounds in London (R. 12); they desired credits in Dollars in New York, and they desired to have them *on June 15th* (R. 12, 13). Accordingly, at respondents' request, instructions were given by the London banks to the two New York banks that each should pay $30,000 to the bankrupts "for account of" respondents on June 15th. There is no evidence of any *intention* to constitute the bankrupts agents or bailees of checks which might be deposited by New York banks with the bankrupts "for the respondents' account." What the respondents wanted was a credit on June 15th, and in all their prior transactions "under circumstances substantially the same" (R. 19), as those in the present case, they always desired credits on particular days, not checks deposited for the

proceeds of which they only would have received credit at a later date.

It is, of course, well known that it is of the utmost importance for banking houses engaged in international transactions and maintaining accounts in various foreign countries to have credits in their favor established on specific days in accordance with prior arrangements. This is so because the bankers must know in advance just when credit abroad is available to them. Where a credit in one country is established or purchased by the transfer of a credit in another—as in the present case the respondents arranged for the establishment of their New York Dollar credits by the transfer of London Pound credits—the additional reason for having the new credit established as of a definite date is that the banker does not desire to lose interest on his one credit—the London Pound credit in this instance—without on the same day being assured of receiving interest on the credit to be acquired—in this instance the Dollar credit with the bankrupts. In all their prior dealings where transactions were carried on "under circumstances substantially the same" the respondents accordingly "had knowledge of the dates on which checks were instructed to be delivered to Knauth, Nachod & Kuhne in New York" and subsequently were advised of the actual receipt of the checks when contemplated (R., 22).

What the respondents desired, what they intended to procure through these and through prior transactions—namely a credit upon a definite specified day, they did procure. On June 15, 1923, and on all the other occasions when transactions were carried out "under circum-

stances substantially'' similar, when the New York banks sent to the bankrupts their cashier's checks to the bankrupts' order ''for account of'' the respondents, the respondents' ''account'' on bankrupts' books (not some collection account) was immediately credited with the amount of the checks received *and interest was allowed from the date of the credit.* By that credit to the respondents' account and the allowance of interest, respondents' instructions were complied with and in banking parlance ''the credit was established.''

Although the effect of this crediting of interest is treated lightly by the Court below, it is the established rule of this Court and of courts generally that *the payment of interest is almost conclusive evidence of the existence of a debtor-creditor relationship.* Thus, in *Upshur* vs. *Briscoe* (1891), 138 U. S., 365, 375, this Court said:

> ''It was stated expressly that the annual payment of $700 was to 'be considered as interest upon the said amount of $10,000;' and that, in case Annie M. Andrews should marry and leave issue, the $10,000 should remain invested as theretofore, in the hands of Briscoe, and the 'interest' should continue to be paid as theretofore mentioned. These terms made Briscoe the owner of $10,000 in his own right. He had the right to use the money in any way he thought proper. *Presumably, he could not pay interest on it unless he invested it. The right to use it in any way he thought proper was repugnant to the idea of any fiduciary relation to the money, for there was no obligation upon him to keep it separate from his own money, or to put upon it any marks of iden-*

> *tification, or to invest it in any particular securities.* * * * The relation created was merely the usual one of contract between debtor and creditor."
>
> See also *Pittsburgh National Bank of Commerce* vs. *McMurray,* 98 Pa., 538;
> *Ames, Cases on Trusts,* (2nd Ed., 1893), page 33, note 1.

The immediate credit and payment of interest was the usual practice and every statement sent by the bankrupts to the respondents over a period of two years during which they did business with each other, indicated that such was the practice (R. 22). Having in mind the end which the respondents sought to accomplish in the present as well as in earlier transactions, and the fact that the acts of the bankrupts were acquiesced in and ratified by the respondents, the only conclusion that can be drawn is that the ordinary relationship of debtor and creditor arose between the bankrupts and the respondents when the Cashier's check of the New York banks were deposited with the bankrupts "for account of" respondents, and these checks were immediately credited to the respondents' account on June 15th and they were allowed interest from the time of such deposit.

C. Absence of Evidence Controverting the Existence of a Debtor-Creditor Relationship.

The Record will be searched in vain for any evidence to show that the *respondents intended* that the bankrupts should take the New York checks in any different ca-

pacity than prior checks had been taken or than cash would have been taken had the New York banks elected to carry out the instructions received by them from the London banks by delivering to the bankrupts cash instead of their own Cashier's checks. *Whichever method the New York banks would have used, they would have advised the bankrupts to credit the amount transmitted "for the account of" the respondents, or otherwise the bankrupts could not possibly have known for what purpose or for whose benefit the money was being transmitted.* Furthermore, since the respondents had contracted abroad for the New York credits *on June 15, 1923,* there is surely no reason to assume an intention on the part of the New York banks *not* to comply with their foreign correspondents' obligations—as they would have failed to comply had they delivered to the bankrupts checks for which respondents would only have received credit after collection and on some date later than June 15.

There is no reason why the Courts should be astute to discover special agreements that the relationship between the parties was intended to be other than that usually existing between banker and depositor. If such special agreements are desired, they may easily and clearly be made.

It is, of course, well known that since the decision of this Court in the *Burton* case, many of the banks throughout the country, in cases where they deem it necessary, have protected themselves from the application of the rule of that case by very definite special agreements found in pass-books or on deposit slips. These express

agreements have in many instances become necessary because banks with depositors of all classes doing a large and miscellaneous business found it unwise to assume the risk, flowing from the rule of the *Burton* case. *In the present case, however, no such special agreements have been shown,* nor from the very nature of the bankrupts' business, were such agreements necessary with customers, such as the respondents, for whose account New York Cashier's checks were being deposited. These were transactions between banks, not involving checks of unknown value on distant points. The bankrupts could well accept Cashier's checks of New York banks as money, and this it appears was their practice.

Despite the fact that it was respondents' burden to show the existence of a special agreement modifying the general rule, the Record is devoid of any evidence on that subject other than *petitioner's* special evidence in support of the existence of the general rule, to wit, his evidence to the effect that to the respondents' knowledge, it was the general practice to credit checks received immediately on their receipt and to allow interest to the respondents from that date.

D. Conclusion to Point I.

Accordingly, it is submitted, that unless varied by the single circumstance that the New York banks regularly carried out their obligation to create a credit on definite dates contracted for in advance by drawing their cashier's checks to the order of the bankrupts "*for account of*" respondents, the ordinary rule must apply, and the ordinary relation of debtor and creditor was created

from the time of the receipt and credit of the checks, and was unaffected by the subsequent bankruptcy. And it is, therefore, submitted that the doctrine of *Foley* vs. *Hill* and *Burton* vs. *United States,* is applicable and leads to the conclusion that beneficial title to the checks passed to the bankrupts on June 15th, and that thereafter, the respondents were no more than general creditors of the bankrupts.

It now will be shown in the succeeding Point that the use of the words "for account of" upon the face of the checks deposited does not affect the conclusion reached.

POINT II.

The words "for account of" on the face of the checks delivered to the bankrupts by the National City Bank and the Bank of Commerce were merely for the purpose of informing the bankrupts on whose account the money was being paid. They were not intended to and could not determine or vary the nature of the relationship existing as a fact between the respondents and the bankrupts. The beneficial title to the checks upon their receipt must be determined by the arrangements between the bankrupts and the respondents and not by the acts of third parties.

Four fundamental errors underlie the argument of the respondents and the conclusions of the court below:

1. That the words "for account of" in the present

case, though used by third parties (the New York banks), whose rights are not in question, must determine the rights not of those third parties, but of two other parties, the bankrupts and the respondents, irrespective of what, in fact, is the actual relationship between those two parties as a result of their own arrangements.

2. That the words "for account of" must always have the same meaning, irrespective of the circumstances in which they are used.

3. That the form of the instrument, since it might affect the bankrupts' power of disposing of the check, is material in determining the relationship betweeen the bankrupts and the respondents and the capacity in which the bankrupts received the checks.

4. While admitting that irrespective of the form of the instrument an express agreement would be controlling, the court failed to find the existence of such an agreement as a fact from the uncontradicted evidence.

The First Error.

In Point I it has already been shown that as between the bankrupts and the respondents, it was clearly the intention of both parties that only a debtor-creditor relationship should exist between them for deposits made to the credit of respondents' account, by New York banks. Since that is so, it is submitted that the acts of a third party—National City Bank or Bank of Commerce in this case—cannot and were not intended to affect the relationship between the other two parties. Without considering at this time the effect of the use

of the words "for account of" upon the rights or obligations of the New York transmitting banks, or even of still other parties to whom the checks might later be negotiated, petitioner contends that once the checks were delivered into the possession of the bankrupts, the legal result thereof *so far as respondents are concerned* and the rights of the respondents therein are governed not by the acts of those third party banks, but by the understanding existing between the bankrupts and the respondents.

That is, assume that an express written agreement existed between the bankrupts and the respondents that all checks deposited for the respondents' account—either by respondents themselves or by third party banks—should be immediately credited and, specifically, that title thereto should immediately pass to the bankrupts, with the resulting general indebtedness from the bankrupts to the respondents. Could it then be seriously contended that, whatever were the terms that appeared upon the face of the checks transmitted to the bankrupts, they could vary or affect the written agreement between the banker and his depositor *as between those two parties.* Could it be doubted that the rule of the *Burton* case would apply? The existence of such a contract between the bankrupts and the respondents has been shown in Point I by the course of dealings between them over a period of years. The reasons why such a contract was essential in the conduct of the business has also been shown. The acts of the National City Bank and the Bank of Commerce could not change that contract and were not intended to affect any change therein.

The Second Error.

Assume, however, that the intent of the New York banks is material in determining the relationship between the bankrupts and respondents. Then the second error of the court below is its decision in effect that in determining the New York banks' intent, their use of the words "for account of" *must* have the same legal results as when those words are used in the ordinary form of restrictive *endorsement*, such as existed in the leading case of *White* vs. *Miners National Bank*, 102 U. S., 658, and the long line of cases following it.

In point of fact, it is obvious that the City Bank and the Bank of Commerce *did not intend* to constitute the bankrupts either the agents of those banks to collect the checks, or the agents for the respondents. The respondents desired credits at the bankrupts on *June 15th* (Ex. B. R. B. and Ex. H. R. 15), and it was in pursuance of contracts made by the respondents with Lloyds Bank and the Swiss Banking Corporation for that purpose, and presumably to comply with and carry out the foreign banks' obligations under those contracts, that the National City Bank and the Bank of Commerce respectively made the payments to the bankrupts on June 15th. *By some method, these two banks had to inform the bankrupts why and for whose benefit the money was being paid, whatever the nature of that benefit.* This could have been done either by writing upon the face of the check that the amount was being paid for the "account" of the respondents, or by a separate covering communication, as was done in the case of one of the checks in the *Latzko* case, also now pending before this

Court. As was said by Judge Augustus Hand in his decision in the District Court in the *Latzko* case:

> "Instructions to place it to such account emanated from them (the New York banks), *and due to the necessity of indicating for whom the check was received, create a different situation from that in White* vs. *Miners National Bank*, 102 U. S., 658."

How other than by the use of the words "for account of" could the New York banks have indicated to the bankrupts the name of the person who had an "account" with them for whose benefit the checks were being transmitted? Clearly, the City Bank and the Bank of Commerce did not intend to constitute the bankrupts the agents of those very New York banks to collect their own cashier's checks. If the New York banks, in complying with instructions from abroad, had sent bullion instead of checks, they would, of necessity, have had to accompany it with the same information "for whose account" it was being paid. In these latter circumstances it could not seriously be urged that the *money* delivered to the bankrupts under instructions that it was "for account of" Rochling, was transmitted "for collection" or otherwise restrictively,—or other than as a deposit creating a debtor and creditor relationship. The mere fact that the payment was made by cashier's check which designated the "account" for whose benefit the payment was made, cannot change the result *unless the realities of the situation are to be ignored by the creation of some rule of thumb.*

It must also be borne in mind that if, as the respond-

ents contend, the New York banks intended to deliver the checks to the bankrupts for collection only and in a fiduciary capacity, the New York banks would not have been complying with the obligations of Lloyds' Bank London and the Swiss Bank Corporation under their contracts with respondents. Under those contracts the foreign banks had undertaken to procure for respondents, at Knauth, Nachod & Kuhne, the respective amounts of $30,000 *on June 15th, 1923* (Exs. A, B, G and H, R, 12, 13 and 15). It should not be presumed, in the absence of very clear and definite evidence, that the acts of the New York banks in delivering their Cashiers' checks to the bankrupts were not in compliance with the engagements of the London banks on whose behalf the New York banks were acting. If, by any interpretation of the facts, the acts of the New York banks can be deemed a compliance with the foreign banks' obligations to respondents, the facts should be so interpreted. What these banks intended was that the bankrupts should, on receipt of the Cashiers' checks, give immediate credit to the respondents for the amounts thereof, which credits would, as a result, be immediately available to the respondents. Such a result could only be accomplished if the bankrupts acquired beneficial title to the checks immediately on their receipt. By accomplishing this result the obligations undertaken by the foreign banks would be performed. Had the New York banks intended that the checks should be delivered only for collection the result which they had undertaken to effect could not have been attained. Accordingly, it is clear that the words "for account of" were intended

to be words of identification and not words of limitation.

The Inapplicability of White vs. Miners National Bank, and Similar Cases.

The single argument advanced by the respondents and the court below to justify their ignoring the arrangement of the parties, as evidenced by their prior dealings, is that in a line of cases involving one form of restrictive *endorsement* and not dealing at all with the banking transaction here involved, the words "for account of" have been held by Courts to result in an agency relationship. Assuming that cases relating to endorsements have any relevancy at all to the problem presented by the present set of facts, the distinction between those cases and the rule to be applied in the present case is recognized by the Negotiable Instruments Law itself.

Section 66 of the Negotiable Instruments Law of the State of New York (Laws 1909, Chapter 43), which is Section 36 of the Uniform Negotiable Instruments Act, provides:

> "Sec. 66. *When indorsement restrictive.* An indorsement is restrictive, which either:
>
> 1. Prohibits the further negotation of the instrument; or
>
> 2. Constitutes the indorsee the agent of the indorser; or
>
> 3. Vests the title in the indorsee in trust for or to the use of some other person.
>
> But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

And Section 67 of the New York Act (Section 37 of the Uniform Act), provides as follows:

> "Section 67. *Effect of restrictive indorsement; rights of indorsee.* A restrictive indorsement confers upon the indorsee the right:
>
> 1. To receive payment of the instrument;
>
> 2. To bring any action thereon that the indorser could bring;
>
> 3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.
>
> But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

From the foregoing sections, it is apparent that restrictive endorsements fall into two classes:—

(a) Those for the benefit of the endorser himself; and

(b) Those for the benefit of a third person.

Where an instrument drawn by A to the order of B is endorsed by B to C for account of B or for B's benefit, then the rule is settled that B, the endorser, constitutes C merely the agent of B, and that neither the legal nor the beneficial title passes to C and that C becomes merely the agent of B to collect the instrument. In legal effect, the instrument is a mere power.

Where, however, an instrument drawn by A to the order of B is endorsed by B to the order of C for account of or for the use of *D*, then the rule is that B intends to and does divest himself of all legal title and that C obtains the legal title to the instrument which he holds *prima facie* for the use of D.

But in this second class of cases, it is apparent that the question remains open as between the endorsee (C) and the third party (D), whether C, the endorsee, takes not only the legal title, but as against D, also the beneficial title. That question is one which depends wholly upon the arrangement which, in fact, exists between C and D. If by agreement, express or implied, they have arranged that upon the receipt of this type of instrument, both legal and beneficial title shall pass to C and that a mere debtor and creditor relationship shall spring up, that is no concern of B who has divested *himself* of all interest in the instrument. If, in fact, no such agreement has been made, either expressly or by a course of conduct, or by any other method, then, of course, C would hold the proceeds for the use of D.

With these fundamental distinctions in mind, it becomes apparent that even if the principles underlying the restrictive endorsement cases are at all relevant here, the cases relied upon by the respondents are not inconsistent with the contentions of the petitioner.

The respondents and the court below relied mainly, if not entirely, on a line of cases which have as their original authority the decision of this Court in *White* vs. *Miners National Bank* (1880) 102 U. S., 658. An analysis of the *White* case, which is for this purpose an analysis of all of the cases following it, and a comparison of its facts with those of the present case furnishes the best illustration of why those decisions are inapplicable to the present circumstances and why the District Court was correct in holding that the checks in the

present case had *not* been deposited for collection. In the *White* case the Miners Bank, the payee, by its president Brownell, endorsed drafts to the plaintiff White in the following manner:

> "Pay S. V. White or order for account Miners Bank, Georgetown, Colorado. J. L. Brownell, P't."

White paid the bank the amount of the drafts less a discount, and when the drafts were not paid at maturity sued the bank both on its endorsement and for money paid to the bank's use. The decision of this court was that the plaintiff might recover on its second count for money paid but in the course of its opinion, at page 661, it stated that:

> "It seems to us that the Court below correctly construed the effect of the endorsement to be to make White the agent of the bank for the collection of the money."

But in the *White* case, as in all of the other cases relied upon by the respondents, the endorser endorsed to the endorsee for the *endorser's benefit*, and therefore intended to constitute the endorsee the endorser's agent to collect the drafts—a mere power—an endorsement of the first class under New York N. I. L., Sec. 66, quoted *supra*. Under these circumstances, neither legal nor beneficial title passes to the agent. *In none of these cases, however, was the question presented as to the respective rights of the endorsee and the third party for whose account the endorsement was made*—an endorsement of the second class under Sec. 66. In all the cases

relied on by respondents, the question was either as to the respective rights of the endorser and endorsee, or of the endorsee or a subsequent holder, as against the maker. In none was there proof of the actual relation between the endorsee and the third party, nor proof as to what their respective rights and obligations were or their respective intentions. In none was the instrument drawn at the instigation of the endorsee.

Again, in the *White* case, as in all of the cases relied upon by respondents, the defendant-endorser had no account with the endorsee (White) for which "account" the endorsee received the drafts and to which "account" the amounts of the drafts were to be credited. The natural and reasonable construction of the endorsement in those cases was that the endorser (Miners Bank) intended to constitute the endorsee (White) its agent to collect the drafts from the third party drawees. Just as in the present circumstances the use of the words "for account of" could not have been avoided if the bankrupts were to be instructed for what purpose the payments were being made to them, so in the *White* case the use of the words "for account of" could have had no other meaning or purpose than to constitute the endorsee an agent for collection. In the *White* case the words did not have to be used to explain the source of the payment inasmuch as the transaction was between the only two interested parties. There was no payment by a third party for *another's* "account" which required explanation.

The portion of this Court's opinion in the *White* case that parole evidence could not be offered to vary the

meaning of the written words "for account of" has no application to the present circumstances. As stated by this court in its opinion at page 660:

> "The plaintiff in the White case sought to show by parole testimony that he had 'bought and paid full value for the drafts, *with the understanding that he was buying it as commercial paper* with the usual incidents of such a transaction'."

Plaintiff White was not offering parole evidence to *explain* the meaning of the words "for account of." His only effort was to contradict them and *deny them any meaning* by offering parole evidence of a separate and distinct agreement allegedly made at the time of the endorsement and transfer of the drafts. In the present case there is no such attempt on petitioner's part to disregard the words "for account of" or to deny them meaning. Petitioner's position, on the contrary, is that when the words are interpreted in the light of the circumstances attendant upon the delivery of the checks to the bankrupt it clearly appears that the words are nothing more than a designation of the "account" on bankrupts' books entitled to be credited. This involves simply a consideration of the surrounding circumstances not to vary but to explain the meaning of words. It seems superfluous to cite *in extenso* authority in support of the court's right to consider extrinsic circumstances in interpreting a written instrument. Only two leading cases will therefore be referred to, one in this court, and one in the New York Court of Appeals.

In *United States* vs. *Bethlehem Steel Co.* (1906), 205 U. S., 105, the Supreme Court sustained the lower court

in the latter's consideration of certain letters between the parties prior to the execution of a contract as an aid to the interpretation of that contract. The contract by its terms provided for a "penalty" in the event of a default by one of the parties. There subsequently was a default and when the injured party sued to recover the amount of the "penalty" as liquidated damages, he offered in evidence various letters passing between the parties in support of his contention that though the word "penalty" was used, the parties had intended to provide for liquidated damages. An objection was taken to the admission of such extrinsic evidence. The unanimous court through Mr. Justice Peckham held the evidence admissible saying (page 117, *et seq.*):

> "It is objected on the part of the Company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to and it is insisted that under that rule the various letters passing between the parties prior to the execution of the contract are not admissible.
>
> "The rule that prior negotiations are merged in the contract is general in its nature and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. * * * While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given

as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. *Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. Simpson* vs. *United States,* 199 U. S., 397-399. In *Brawley* vs. *United States,* 96 U. S., 168-173, the court says: 'Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms.'

"It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that in cases of doubt as to the meaning of language actually used prior negotiations may sometimes be referred to. * * *

"It is true that word 'penalty' is used in some portions of the contract, although in the clause providing for the $35 per day deduction that word is not used, nor are the words 'liquidated damages' to be found therein. The word 'penalty' is used in the correspondence, even by the officers of the Government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages. It was used simply to provide that the amount named might be deducted if there were a delay in delivery."

Similarly in *Middleworth* vs. *Ordway* (1908), 191 N. Y., 404, a contract was made between an infant's father and the infant's proposed foster parents, providing that the infant upon reaching the age of 18 years should be entitled to her "dower right" in the property of her foster parents, "the same as though she were their own legitimate offspring." The court held that although no "dower right" exists in favor of a child, natural or adopted, the court could properly go beyond the terms of the written contract to consider the circumstances of the case in support of its conclusion that "dower right" under the circumstances meant that portion of the foster parents' estate which a legitimate child of theirs would receive upon their death intestate. The court in summarizing the basis of this conclusion said:

> "We decide the case on the face of the written instrument, which was not disputed, and which is the only contract that the law recognizes as having been made. While the conversations were inadmissible for the reason given, the circumstances surrounding the parties when they signed the instrument were properly shown to prove delivery (*Chouteau* vs. *Suydam*, 21 N. Y., 179), and for the purpose of enabling the court to see whether their situation reflected light upon the words used in reducing their agreement to writing (*Thomas* vs. *Scutt*, supra). In other words, while the law excludes parol evidence of their expressed intention, it receives evidence to show their situation and the occasion which led to the contract."

Respondents here have contended that the "ordinary legal significance" of the term "for account of" is defi-

nite and unambiguous and that, therefore, no extrinsic circumstances should be considered. Certainly the two terms "penalty" and "dower" ordinarily have definite and unambiguous meanings in the law. Nevertheless, this Court and the New York Court of Appeals justified an examination of circumstances extrinsic to the documents in which such terms occurred to sustain an interpretation of those terms different from their "ordinary" meaning. Surely the word "debt" is as definite as "account," and yet "debt" has been construed in this Court under certain circumstances to include taxes and under other circumstances to exclude taxes.

Price vs. *U. S.* 269 U. S., 492.

In short the terms "penalty" and "dower" and "debt" in the *Bethlehem* and *Middleworth* and *Price* cases, and "for account of" in the present case are in no way contradicted or varied by a consideration of the extrinsic evidence as to the surrounding circumstances and the understanding of the parties. The fact is that on considering the extrinsic evidence their real meaning, under the circumstances, is ascertained, and in the instant case the meaning of "for account of" when so ascertained is clearly different from what the respondents please to call the "ordinary" meaning of the term.

Furthermore, irrespective of all the foregoing, the rule is elementary that in a controversy between a party to the instrument (here the bankrupts), and a third party (here the respondents) the parole evidence rule is in-

applicable and either party may even contradict the instrument by extrinsic evidence.

Central Coal & Coke Co. vs. *Good & Co.*, 120 Fed., 793, 799, and cases there cited.

In summary then, in the present case, the rights of the *respondents* are being considered and it is third parties, to wit, the *New York banks*, who used the allegedly restrictive words. Furthermore, in all the other cases which deal with *endorsements*, the only conceivable reason for the use of the words "for account of" was to create the endorsee a fiduciary, whereas in the present case, as has already been pointed out, *even if no fiduciary relationship was intended*, there would have been no other way for the New York bank to indicate the person to be benefited by the payment other than by the use of such or similar words. Nor did the New York banks have the right to determine as between the bankrupts and the respondents the effect of the deposit of the checks. *There is nothing in common between the circumstances of the present case and those of all of the other cases relied on by the respondents, other than the simple fact that the same words "for account of" were used.*

In the construction of contracts, as in the construction of statutes, the Court must determine from the surrounding circumstances and engagement of the parties the meaning of their words, and cannot blindly decide that words used in one sense in one place *necessarily* and *conclusively* mean the same when used under wholly different circumstances and by parties not similarly situated.

The Third Error.

The third error of the court below lies in its undue emphasis on the form of the instrument as a test of the relationship of the bankrupts and the respondents. The court argues that the words "for account of" on the face of the instrument "has limited the payee's free disposal of the check in the interest of another" (R. 34). Similarly in the *Latzko* case (R. in Nos. 337 and 338, p. 78), the court differentiated between the case in which the words "for account of" appeared on the face of the check and the case in which such words appeared only in a covering letter, holding that in the latter case the bankrupts took beneficial title and that in the former, they did not.

Petitioner contends that whatever effect the appearance on the face of the instrument of the words "for account of" might have to put subsequent transferees on notice to investigate what was *in fact* the relationship between the bankrupts and the respondents, and what, as a result thereof, was in fact the bankrupts' title, the mere fact that such notice is given does not in itself mean that the bankrupts did not acquire beneficial title to the check. *The actual relationship between the parties and the bankrupts' title depends entirely upon the arrangement between those two parties, the bankrupts and the respondents.* Since as a matter of fact, the relationship between those two parties was such that the title to the checks passed to the bankrupts, subsequent transferees, such as the Guaranty Trust Company and the American Exchange Bank in the present case, could acquire title there-

to. Thus, while the appearance on the face of the check of the words "for account of" might put the subsequent transferee on notice to investigate the transferor's title, in the present case such a transferee on investigation would have found that the bankrupts had title and the right to dispose of the checks. The only effect of the appearance on the face of the check of those words is *to put the transferee on notice—not to determine what is the fact.* The difference, therefore, between the case where the words "for account of" on the face of the check and the case where they do not is purely one of notice to a third party and not one determinative of the substantive rights between the payee and the person for whose account the check is paid.

The Fourth Error.

The fourth error of the court below lies in the fact that while it admitted that an "express" agreement would control over the form of the check, it concluded that the special agreement relied on here by the petitioner was "factitious" (R., 31). That the agreement between the respondents and the bankrupts was not factitious appears, it is submitted, from the analysis of the law and the facts as set forth at length in Point I. The court need only be reminded at this point that a presumption in favor of the existence of a debtor-creditor relationship exists as a result of this court's decision in the *Burton* case; that, therefore, the burden is on the respondents here to prove a special agreement resulting in the existence of a fiduciary relationship; that not only

is there no such rebutting evidence by the respondents in the Record but that, as set forth in Point I, the presumption created by the "Burton rule" is supported by the affirmative evidence that upon receipt of the checks by the bankrupts they were always immediately credited to the respondents' account and interest allowed from that day on the amount of the credit—and that all this was exactly what the respondents had contracted for and desired, the establishment of a credit on the very day that the checks were delivered.

POINT III.

In Conclusion.

This Court in *White* vs. *Miners National Bank, supra,* recognized the salutary principle that in construing commercial or banking transactions, courts should proceeed with caution. This principle is peculiarly applicable in the present case. Petitioner submits that in transactions between banks, such as those here involved, the strongest evidence should be required of that party who asserts that the relationship between a banker and its depositor is other than the ordinary one of debtor and creditor—a relationship which is essential for the conduct of modern banking. Only by clear and convincing proof should the burdens of a fiduciary relationship be imposed upon a banker. Petitioner submits that the

respondents here have wholly failed to meet the burden which was theirs.

The judgment of the Circuit Court of Appeals should be reversed, and the respondents' reclamation petition denied.

Respectfully submitted,

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No. [redacted] 34

Supreme Court of the United States

OCTOBER TERM, 1926.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, *et al.*, trading as Gebrueder Rochling,

Respondents.

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, et al., trading as GEBRUEDER ROCHLING,

Respondents.

REPLY BRIEF FOR PETITIONER.

As was foreseen in petitioner's original brief, the respondents' argument rests essentially upon two contentions. First, that the mere use of the words "for account of" must always have the same meaning as when those words are used in the ordinary form of restrictive endorsement, and second, that no evidence has been offered by the petitioner to show that those words in the present case have a different meaning.

1. The Respondents' First Argument.

On pages 6 through 17 of their brief the respondents carefully list and analyze a great number of cases, the doctrine of which is the undoubted and well settled law of this court, but which is totally inapplicable to the circumstances of the present case. The facts in the leading

case of *White* vs. *Miners National Bank* (1881) 102 U. S. 658, are representative of all of the cases relied on by the respondents and if the facts of that case are distinguished from those in the present one, all of the cases relied on by respondents, except perhaps *Treutel* vs. *Barandon,* to be considered later, under this first argument are likewise distinguishable.

All of those cases have to do with the *endorsement* of an instrument by the payee (A) to the order of a third party (B) for the account of the payee-endorser (A). On those facts the cases held that the endorsee (B) becomes merely the agent of the endorser to collect the instrument and that he acquires a mere power and does *not* acquire either legal or beneficial title to the instrument. As this court said in the very portion of its opinion in *White* vs. *Miners National Bank,* quoted and relied upon by the respondents at page 9 of their brief:

> "The plain meaning of it (the endorsement) is, that the acceptor of the draft is to pay to the indorsee, for the use of the indorser. The indorsee is to receive it on account of the indorser. *It does not purport to transfer the title of the paper* or the ownership of the money when received."

The respondents fail utterly to comprehend and dispose of the distinguishing feature in all of these cases relied on by them which distinction is not only impliedly recognized by this Court in that portion of its opinion in the *White* case already quoted, but is specifically recognized by the provisions of Secs. 66 and 67 of the New York Negotiable Instruments Law (quoted in full at pages 30 and 31 of petitioner's original brief), and by

such cases as *Hook* vs. *Pratt*, 78 N. Y., 371. *None* of these cases relied upon by respondents deal with an endorsement situation analogous to the situation here presented. Without considering at all the effect of the fact that *the present case does not deal at all with an endorsement*, but with an instrument made by the National City Bank (in the case of one check), payable to the order of Knauth, Nachod & Kuhne for the account of the respondents, the analogous endorsement situation would be a check payable to the National City Bank and endorsed by it to the order of Knauth, Nachod & Kuhne, not for its, the National City's Bank own account, but for the account of a third party, the respondents. Thus, in summary, all of these cases cited by respondents are cases where A endorses to B for the account of A, whereas the analogous endorsement situation to that raised by the present case is an endorsement by A to B for the account of *C*. In this last situation A does not constitute "the endorsee" (B), the agent of the endorser (as in the cases relied upon by the respondents and recognized by subdivision 2 of Sec. 66 of the New York Negotiable Instruments Law), but on the contrary A by endorsing "vests the *title* in the endorsee (B) in trust for or for the use of some other person (C)," a totally different result as is recognized by subdivision 3 of Section 66 of the Negotiable Instruments Law and by the cases such as *Hook* vs. *Pratt*, supra.

Thus, when the two New York banks in the present case drew their own Cashier's checks in favor of the bankrupts "for account of the respondents" the bankrupts did not become the mere agent of the New York

banks to collect the latter's own obligation from themselves but the bankrupts immediately acquired legal title to the checks. Whether the bankrupts also acquired beneficial title depended entirely upon the arrangement existing between them and respondents and was not in any wise affected by the acts or conduct of the two New York banks. The petitioner has already shown, it is believed, that as a matter of fact the arrangement between the bankrupts and the respondents was such that upon the bankrupts' receipt of the checks "for the account of respondents" complete legal and beneficial title immediately vested in the bankrupts and the respondents became merely the general creditors of the bankrupts for the total amount then standing to the credit of their account with the bankrupts.

The petitioner's contention is supported by the presumption which exists as a result of the decision of this court in *Burton* vs. *United States*, 196 U. S., 283, to the effect that title to checks deposited with the banker for the account of the depositor passes to the banker in the absence of a special agreement to the contrary. Not only have the respondents in the present case failed to show such a special agreement taking the present deposit without the field of the presumption, but the petitioner on the other hand has affirmatively supported that presumption by additional evidence, such as the fact that the amounts deposited were immediately credited to respondents and *bore interest from the date of their deposit*—which evidence is discussed later.

In the single case of *Treutel* vs. *Barandon* referred to by the respondents at page 19 of their brief, there

was an endorsement by A to the order of B for the account of C. On those facts, on the authority of *Hook* vs. *Pratt, supra,* and of the specific provisions of the Negotiable Instruments Law, the endorsee (B) would have taken legal title to the instrument and the question would simply remain open as to whether B also received beneficial title. In the *Treutel* case it appeared not only that there was no bank-depositor relationship between B and C and, accordingly, that no presumption of a debtor-creditor relationship existed, but it even appeared affirmatively that the relationship between De Roure & Co. (B) and Treutel (C) was that of principal and agent. Accordingly it was held that the agent could not dispose of the principal's property for his own use. If, on the other hand, it had appeared, as it does in the present case, that as between De Roure and Treutel the former was the beneficial owner, Treutel would not have been successful in recovering the instrument from De Roure's transferee, the defendant.

Dominant Facts Must Control.

The "dominant facts"* of the present situation should not be sacrificed on the [redacted] altar of the formula offered by the respondents and built on the line of cases of which *White* vs. *Miners National Bank* is typical. Those dominant facts which the respondents have wholly overlooked are that the parties here involved were all bankers; that the respondents desired a credit with the bankrupts on a day certain; that they obtained that credit upon the day which they desired it and had con-

Nat'l City Bank vs. *Hotchkiss* (1913), 231 U. S., 50.

tracted for; and that the only practicable banking method in which the transaction could have been consummated, and the credit established when desired, was by the method here employed. The purely formal steps taken to accomplish the result were simply the mechanics of the transaction. The mere fortuitous similarity of the language employed in effecting the desired result with the language employed under wholly different circumstances in the ordinary restrictive endorsement cases, relied on by respondents, should not override the underlying intention of the parties or produce a result wholly at variance with the dominant facts.

Finally, that the checks bore on their face the statement that they "were payable only through the New York Clearing House" cannot determine in what capacity the bankrupts received them. Whether received by them for collection or as complete beneficial owners, the notation quoted simply delayed the right to realize on the instruments and could not determine in which of the two capacities the checks were received. It cannot seriously be argued that beneficial title to a negotiable instrument, payable in the future, *can not* be acquired before its maturity.

2. The Respondents' Second Argument.

Nothing contained in respondents' brief affects petitioner's argument appearing at pages 18 to 23 of petitioner's original brief that the Record here contains affirmative evidence supporting the intention to create a debtor-creditor relationship and absolutely no evidence controverting the intention to create such a relationship.

The factual analysis of that evidence need not therefore be repeated here, but a brief consideration will be given to individual objections raised by respondents.

(A) Respondents contend, page 24, that if the London banks did not comply with their obligation to respondents to create a credit for respondents in New York on June 15, 1923, they still remained liable to the respondents. This fact is conceded, but its materiality is not understood. If any presumption is to be indulged in on the basis of that fact it should be the presumption that the London banks performed the obligations undertaken by them rather than that they failed to do so. The results contended for by petitioner would mean that the London banks had performed their obligation to respondents and that the New York banks in turn had performed their obligations to their London correspondents; that there had been established the credits which the respondents had bargained for; and that this had been done in the manner which had for years been employed. The respondents' contention, overlooking entirely the intention of the parties and resting wholly on the authority of the formula that "for account of, meaning one thing in one place, must mean the same thing in another" would lead to the unlikely result that the London and the New York banks in employing a regularly recognized banking practice were not performing their contractual obligations.

(B) Respondents point out, at page 26, that the Receiver, upon his qualification, reversed the credit which the bankrupts had given to the respondents on receipt by

them of a third $30,000 check from Speyer & Co., payment of which was stopped by the drawer. That fact cannot affect the capacity in which the bankrupts received the two checks here in question because, first, the act of the Receiver after the bankruptcy is no evidence of the intention of or arrangement between respondents and the bankrupts, and was made at a time when the Receiver could not even have ascertained what the prior dealings of the parties had been; and second, in any event the rights of the parties were by law fixed as of the date of the filing of the petition in bankruptcy and no act either of the Receiver or the respondents could thereafter change the existing relationship, whatever it was. *Everett* vs. *Judson* (1913), 228 U. S., 474.

(C) The respondents cite the cases of *National B. & D. Bank* vs. *Hubbell* (1889) 117 N. Y., 384, and *In re Jarmulowsky* (C. C. A. 2nd, 1918) 249 Fed., 319, in an attempt to avoid the almost inevitable conclusion that since the bankrupts allowed interest to the respondents on the amount of the checks from the date of their receipt, the title to the checks passed to the bankrupts and there resulted only a debtor-creditor relationship between the bankrupts and respondents. Neither the *Hubbell* or the *Jarmulowsky* cases are authorities in the present situation. While in the *Hubbell* case interest was allowed from the date of deposit and in the *Jarmulowsky* case the depositor was permitted to draw against his account from the date of deposit, there existed specific written agreements to the effect that the items were deposited with the bankers *for collection.* The court's statement of facts in the *Hubbell* case, as quoted by the respond-

ents themselves at page 29, clearly includes a finding that for a number of years the plaintiff there "had been accustomed to forward to the firm of Wilkinson & Co. for *collection* checks, drafts, and notes owing to the plaintiff * * *" In the *Jarmulowsky* case the pass book in the hands of the depositor contained the specific provision that "deposits of currency or coin may be drawn against after deposited, *but deposits of checks shall not be drawn against until collected.*" The holdings in those two cases, therefore, are simply to the effect that the payment of interest in the one case and the permission to the depositor to draw in the other were mere privileges granted by the banker and not rights to which the depositors were entitled. The respondents in attempting to use those authorities in the present case are arguing in a circle. They attempt to meet petitioner's showing that "for account of" does not always mean for collection—that in the present case the payment of interest indicates that despite the phrase "for account of" a debtor-creditor relationship existed—by showing that in cases where checks were admittedly deposited "for collection" the payment of interest did not change the legal relationship of the party. To the same effect is the case of *Fifth National Bank* vs. *Armstrong*, 40 Fed. 46, relied on by the respondents at page 35.

CONCLUSION.

The respondents have not even attempted to rebut the petitioner's argument that the essential facts in the present case indicate that the respondents bargained for a particular credit upon a particular day, in the transac-

tions involved in the present proceeding as well as in all prior transactions; that the credit was established; that they got what they bargained for; and that, accordingly, when the credit was established the legal and beneficial title to the checks passed to the bankrupts and that the respondents must take their place with the other general creditors in the ratable distribution of the bankrupts' estate. In order to gain a preferential position, the respondents have been compelled to argue that the parties with whom they contracted performed acts which amounted to a failure on their part to carry out their obligations although for at least two years prior to the bankruptcy the same practice had been pursued in similar situations to the knowledge of the respondents, without complaint. The underlying intention of the parties should not be buried beneath a cloak of phraseology.

Repsectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1[redacted] 3[redacted] 34

MIDDLETON S. BORLAND, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, Petitioner,

against

KARL RÖCHLING ET AL., Trading as Gebrueder Röchling, Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 1069.

MIDDLETON S. BORLAND, AS TRUSTEE IN BANKRUPTCY OF KNAUTH, NACHOD & KUHNE, PETITIONER,

against

KARL RÖCHLING ET AL., TRADING AS GEBRUEDER RÖCHLING, RESPONDENTS.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The only possible ground on which the petition herein can rest is that portion of section 5-(*b*) of Rule 35 of the United States Supreme Court General Rules, which reads as follows:

> "Where a circuit court of appeals * * * has decided an important question of general law in a way probably untenable or in conflict with the weight of authority."

None of the other reasons set forth in these rules or reflected in the decisions exist herein. For instance, there is no conflict of authority between different circuit courts of appeal, nor between the Federal and State courts. Nor, indeed, does the petition attempt to suggest that the case comes under any rule other than the one quoted above.

Examination of the case and of the rule make it clear that by the very terms of the latter this petition should be denied.

There is no split of authority on the question at issue and none is suggested in the petition. All of the authorities are unanimous in supporting the decision of the circuit court of appeals.

The question at issue was settled over fifty years ago by the Supreme Court in the case of *White vs. Miners National Bank* (1881), 102 U. S., 658. That case held that the words *"for account of"* on negotiable paper were restrictive, or as stated by the court in the *Latzko & Popper case,* referred to in the petition. (The court's opinion appears herein as "Appendix 1.") When, therefore, in the case at bar it appeared that the decision hinged on the critical facts that the court was dealing with negotiable paper on which appeared the words *"for account of"* it was inevitable and right that the *White case* should have been followed as the controlling and determining authority.

The Decision of the Circuit Court of Appeals is Correct

The Circuit Court of Appeals in this case had to decide the following questions:

1. The applicability or non-applicability of the decision in the *White case* to the case at bar.

2. The difference, if any, between the facts in the case at bar and the facts in the case of *White vs. The Bank.*

The Circuit Court of Appeals decided that the *White case* was controlling and that on the facts presented here the decision should be the same. This decision was rendered by unanimous court, consisting of Circuit Judges Hough, Manton, and Learned Hand. (The court's opinion appears herein as "Appendix 2.")

But these essential questions had also been passed upon by the Circuit Court of Appeals in the case of *Latzko & Popper* referred to in the petition, which case is to be presented to the Supreme Court in an application for a writ of certiorari at the same time as the present application. There again the Circuit Court of Appeals had to pass on the following questions:

1. The applicability or non-applicability of the decision in the *White case* to the case at bar.

2. The difference, if any, between the facts in the case at bar and the facts in the case of *White vs. The Bank.*

The court, consisting of Circuit Judges Rogers, Manton, and Learned Hand, unanimously decided that the *White case* was controlling under the facts of the case at bar.

It thus appears that the very questions which are at the heart of this case have been fully and carefully considered by the Circuit Court of Appeals for the Second

Circuit on two separate occasions. This consideration has been given by four different judges. Two of the judges, Judges Manton and Learned Hand, sat on both cases, and two, Judges Rogers and Hough, took part in only one. All four of the circuit judges have unanimously concurred in the decisions reached by the court. Under these circumstances it cannot be said that the decision is untenable or "that it is in conflict with the weight of authority" and unless petitioner can bring it within these qualifications he admittedly is not entitled to the relief sought.

It is respectfully submitted that a writ of certiorari should be denied.

Respectfully submitted,

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HENRY G. HOTCHKISS,
WILLIAM H. WHITE, Jr.,
Of Counsel.

APPENDIX 1.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Oscar L. Gubelman, James F. Shaw, Rollin C. Newton, Herbert B. Smithers, John R. Hall, Mary W. Knauth, and Theodore W. Knauth, *Individually and as Copartners, Doing Business under the Firm Name and Style of Knauth, Nachod & Kuhne, Bankrupts;* Alexander Latzko, William Latzko, Charles Latzko, Samuel Popper, and Emil Hochstein, *as Copartners, Doing Business under the Firm Name and Style of N. Latzko & A. Popper, Petitioners-Appellants;* Middleton S. Borland, *Trustee-Appellee.*

Before Rogers, Manton, and Hand, Circuit Judges.

Brodek & Raphael, for petitioners-appellants; Charles A. Brodek, Borris M. Komar, of counsel.

Rosenberg & Ball, for trustee-appellee; George C. Ernst, Ralph F. Colin, of counsel.

Kellogg, Emery, Inness-Brown & Cuthell; Henry G. Hotchkiss, of counsel, appearing as *amicus curiæ.*

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, *Circuit Judge:*

This is an appeal from an order dismissing a reclamation claim of copartners doing business as international bankers and maintaining a banking house in the city of Budapest, Hungary, under the firm name of N. Latzko & A. Popper. And on appeals in such a pro-

ceeding this court reviews both findings of fact and conclusions of law.

On June 15, 1923, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that the firm of Knauth, Nachod & Kuhne be adjudged bankrupt and they are hereinafter referred to as the bankrupts.

A temporary receiver was appointed anl qualified and the receivership was extended for each individual member of the copartnership, and the receiver entered into possession of the property of the alleged bankrupts.

The bankrupts were engaged in business as international bankers and maintained a banking-house in the city of New York. They acted as the New York correspondents of the Budapest banking house of N. Latzko & A. Popper, the petitioners.

The nature of the dealings between the two banking-houses involved the transmission of funds by the Budapast house to the New York house, or the delivery by the Budapest house to the New York house of evidences of debt which were collected by the latter and placed to the credit of the former, from which account payments were made from time to time by the New York house upon order or request of the Budapest house.

There was no express agreement that evidences of debt, so forwarded to the bankrupts, were to be credited upon their receipt and before collection as a deposit of cash. Neither was there an express agreement that upon the receipt of such evidences of debt by the New York house the Budapest house should have the right to draw against the fund prior to its collection. But there was no agreement that the Budapest firm could not draw against such evidences of debt before their collection. They simply did not as a matter of

fact do it. The allegations in the petition make this clear and are found in the margin.[1]

In the determination of the questions which are involved it is important to keep in mind the date on which the trustee of a bankrupt's estate becomes vested with the title to the estate.

Section 70*a* of the Bankruptcy Act provides that—

> "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *."

And Remington on Bankruptcy (3rd Ed., volume 3, section 1191, states that the above section of the Bankruptcy Act vests all the property in the trustee, which prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

---

[1] "Fifth. That petitioners had no agreement with said K., N. & K. (the bankrupts) to treat evidences of debt deposited with said K., N. & K. for collection or otherwise, as a deposit of cash, nor that an immediate credit should be given by said K., N. & K. to petitioners upon the receipt of such evidences of debt.

"Sixth. That petitioners did not treat evidences of debt deposited with said K., N. & K. for collection or otherwise, as a deposit of cash, nor as an immediate credit open to petitioners by said K., N. & K. upon the receipt of any evidences of debt, nor did petitioners draw upon said K., N. & K. against the deposit or deposits of such evidences of debt before the collection of moneys due upon said evidences of debt by said K., N. & K."

In Everett *vs.* Judson, 288 U. S., 474, 479, the court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition."

And this doctrine is reasserted in White *vs.* Stump, 266 U. S., 310, 313. In the case last cited, referring to the date when the petition is filed, the court said:

> "The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt.' "

The petition for reclamation in this case alleged that the involuntary petition in bankruptcy was filed on June 15, 1923, at 10.30 p. m. with the district judge, and that on the same day the temporary receiver was appointed, and that on June 16th he duly qualified, filed his official bond and entered into possession of the property of the alleged bankrupts. It then alleges that on June 16, 1923, at 9.30 a. m., the involuntary petition in bankruptcy was duly filed in the office of the clerk of the district court. The receiver filed an answer to the petition in which he denied various allegations contained therein, but he did not deny the allegation that the petition in bankruptcy was filed in the clerk's office on June 16, 1923, at 9.30 a. m.

At the hearing on the reclamation petition before the special master the attorneys for the claimant and those for the trustee for the bankrupts stipulated certain matters and "agreed that throughout the petition the reference to 'the day said petition in bankruptcy

was filed against said K., N. & K.' or any similar allegation, shall mean only 'June 15, 1923' (this refers particularly to paragraphs eight, ninth, tenth, eleventh and thirteenth)."

The paragraphs thus referred to are those which contain the allegations as to the time when the three checks herein involved were delivered, credited and collected and that when the petitioners caused the checks to be delivered to the bankrupts for collection and deposited to the petitioners' account they did not know of the bankrupts' insolvency, and also that when they caused the checks to be delivered to the bankrupts they had a credit balance with the said bankrupts amounting to several thousand dollars and were not then and have not been at any time since indebted to the bankrupts or to the receiver.

This stipulation as to the meaning of "the day said petition in bankruptcy was filed" cannot have the effect of a determination binding upon this Court upon the question of the time when the petition was legally filed so as to determine the rights of the parties as affected thereby. Neither do we understand that the parties meant anything more than that the court should understand that the allegations in so far as they refer to the occurrence of an act on the day when the petition was filed the allegation referred to June 15, 1923. And we hold that the petition was filed not on June 15th, when it was presented at 10.30 p. m. to the district judge, but on June 16, at 9.30 a. m., when it was filed in the clerk's office.

The word "filed" has not been defined by Congress. It has, however, a well-defined meaning. It signifies the delivery into the actual custody of the proper officer, designated by the statute, and whose duty it is to keep the records of the court. It carries with it the idea of permanent preservation of the thing as a public record. A paper is not filed by presenting it to the

judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court for the purpose of making it a part of the records of the case. See United States *vs.* Lombardo, 241 U. S., 73, 76; Laser Grain Co. *vs.* United States, 250 Fed., 820, 831; Emmons *vs.* Marbelite Plaster Co., 193 Fed., 181; *In re* Von Borcke, 94 Fed., 352.

In the case under consideration the claim is based upon threee checks:

1. A cashier's check of the Irving Bank-Columbia Trust Company, dated June 14, 1923, for $3,000.
2. A cashier's check of the National City Bank of New York, dated June 15, 1923, for $1,294.
3. A check of Goldman, Sachs & Co., dated June 15, 1923, drawn on the Bank of America for $15,000.

We shall consider them in the order named.

THE THREE THOUSAND DOLLAR CHECK.—This check may be found in the margin.[1] The check did not indicate on its face that it was for the account of the petitioners. But the bankrupts on June 14th, the day the check was dated and the day on which the bankrupts received it, gave to the Irving Bank-Columbia Trust

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[1] "*Treasurer's Check.*

"NEW YORK, 6/14/23. No. K10217.

"Irving Bank-Columbia Trust Company,

Woolworth Building.

"Pay to the order of Knauth, Nachod & Kuhne, New York City, $3,000.00 Three Thousand and 00/100—Not over Three Thousand ($3,000) Dollars through New York Clearing House.

"G. W. BUGEL,
"Treasurer."

"Countersigned:
"F. J. MORAN.

Company a receipt in which they stated the check was received "for account of N. Latzko & A. Popper, Budapest." The special master held this indicated that the bankrupts undertook to collect the check as an agent for Latzko and Popper. He held that the proceeds, when collected, would have been the property of the Budapest house were it not for the allegation in the petition that the *petitioners caused* the Irving Bank-Columbia Trust Company, who drew the check, to deposit it for the account of the petitioners with the bankrupts. He thought therefore that when the check was so deposited and credited and collected all prior to the filing of the petition in bankruptcy, the bankrupts had become debtors to the petitioners, and the proceeds of the check amounted to a debt due from the bankrupts to them.

This check was credited by the bankrupts to the claimant's account on June 14, 1923, the day before the petition in bankruptcy was presented. And on the same day that the bankrupts credited the check to the claimant's account they indorsed the check to the American Exchange National Bank, and that bank on the same day credited the bankrupts with the amount of the check. The check was collected by the American Exchange National Bank through the New York clearing-house on June 15, 1923. This was the day the petition in bankruptcy was presented to the district judge, though prior to the filing of the petition.

The district judge in his opinion confirming the special master's report, states that this check wae collected the day the petition in bankruptcy was filed, and then goes on to say:

> "The proceeds of the first check clearly became part of the assets of the bankrupts prior to the hour when the petition was filed. I can see no reason for invoking the rule that the law will

take no account of the fractions of a day to defeat the bankrupts' title. It would be as tenable to hold that two *lis pendens* filed at different hours on the same day imposed an identical lien. The claimant cannot prevail as to the first check and the master's report as to it should be confirmed."

We fully agree that the law will take no account of the fractions of a day to defeat the bankrupts' title. It is true that for some purposes fractions of a day are not recognized in law. Louisville *vs.* Portsmouth Savings Bank, 104 U. S., 469; McGill *vs.* United States Bank, 12 Wheat., 511. But the rule that a day is an indivisible period of time is a mere legal fiction, which is subject to numerous exceptions. And one of them is that the courts will disregard the fiction as where it is necessary to protect a completed act or save a vested right, or to determine the conflicting rights of rival claimants when they depend upon priority in fact. Johnson *vs.* Smith, 2 Burr, 950; Cincinnati First National Bank *vs.* Burkhardt, 100 U. S., 686; Westbrook Mfg. Co. *vs.* Grant, 60 Me., 88; Hoyt *vs.* San Francisco, &c., R. Co., 87 Cal., 610; Jackson Brewing Co. *vs.* Wagner, 117 La. Ann., 875; Johnson *vs.* Pennington, 15 N. J. L., 188; Brainard *vs.* Bushnell, 11 Conn., 16; Neale *vs.* Utz, 75 Va., 480.

But we do not agree with the district judge as respects this check that it was actually paid on the morning of June 15th and prior to the filing on the same day, but at a later hour, of the petition in bankruptcy. That petition, for reasons already stated, was not "filed" on June 15th when it was presented to the district judge but on June 16th when it was deposited in the clerk's office. Inasmuch as prior to that time the amount of the check had been credited to the petitioners in their account with the bankrupts, and to the bankrupts in

their account with the American Exchange National Bank, the amount of the check had been actually collected. The bankrupts accordingly had become debtors to the petitioners prior to the filing of the petition in bankruptcy and the amount of the check was a part of the estate which on June 16, 1923, passed to the receiver of the estate of the bankrupts.

But there is another reason for reaching the same conclusion. The deposit of this check with the bankrupts, who were conducting a banking business, although made by the Irving Bank-Columbia Trust Company, was made by it as the agent of the petitioners and deposited under their instructions. It was, therefore, in effect as though deposited by the petitioners themselves. If it had been in fact deposited by them to be credited in their account, and the bankrupts indorsed it and credited it in their account the bankrupts, when so crediting it, would have made themselves at that time debtors in that amount to the petitioners, as no agreement is shown that the petitioners had no right to draw on checks deposited to their credit in their regular checking account until collection was actually made.

In Foley *vs.* Hill, 2 Cl. & Fin., 28, in the House of Lords, the effect of a deposit in a bank was fully discussed by Lords Cottenham, Brougham and Lyndhurst. They concurred in the opinion that the relation between a banker and customer, who pays money into a bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor. And in Bank of the Republic *vs.* Millard, 10 Wall., 152, 155, the supreme court, in 1869, declared:

> "It is no longer an open question in this court, since the decision in the cases of The Marine Bank *vs.* The Fulton Bank, 2 Wall., 252, and of

> Thompson *vs.* Riggs, 5 Wall., 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor."

In St. Louis & S. F. Ry. Co. *vs.* Johnston, 27 Fed., 243A, who had an account in a bank in New York, deposited in the bank a sight draft drawn by him on a corporation in Boston. The bank credited him with the amount of the draft as a cash deposit. The bank was insolvent at the time but it forwarded the draft to its collection agent at Boston and it was paid after the bank had failed and closed its doors. Judge Wallace, sitting in the Circuit Court for the Southern District of New York, held that the draft was not the property of A when paid by the drawee and that he was not entitled to recover the amount thereof from the receiver. He said:

> "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper."

In Burton *vs.* United States, 196 U. S., 283, certain checks on a bank in St. Louis were sent from that city to the payee, in Washington. The payee, on receiving them, indorsed them and deposited them in a bank in Washington, and were immediately credited in the payee's account. The checks were afterwards paid in due course by the St. Louis bank. The court held that the Washington bank acquired the title to the checks

when the deposit was made and credited in the depositor's account. The court said:

> "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more. There was nothing whatever in the evidence showing

> any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs Bank (the bank of deposit) was its owner when sent."

The trial judge in the Burton case had instructed that the effect of the deposit of the checks in the Washington bank depended upon the understanding and intent of the bank and the depositor. That if the intent and understanding was that the bank should become the purchaser of the check and be the absolute owner thereof, then the payment to the Washington bank amounted in law to a payment to that bank and not to the depositor. But if the intent and understanding of the bank and the depositor was that the Washington bank should act as the agent of the depositor, then the payment in St. Louis was in law a payment to the depositor. The supreme court held this was error, and that there was no foundation for submitting to the jury the question as to what the understanding of the parties was at the time the deposit was made. And this it held because the uncontradicted evidence showed that there was no agreement or understanding of any kind other than such as the law makes from the transaction detailed.

This court in *In re* Ruskay, 5 Fed. (2d), 143, 149, stated that where a check or draft is indorsed and deposited in a bank and is accepted as cash, it at once becomes the property of the bank and the bank becomes the debtor of the depositor in the amount of the check

so deposited, with the superadded obligation that the money is to be paid when demanded by check. In the absence of special agreement to the contrary, or some notice to the contrary given to the depositor prior to or at the time of the deposit, such is the rule as to the effect of the transaction.

The New York Court of Appeals in Craigie *vs.* Hadley, 99 N. Y., 133, laid down the law as follows:

> "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

The general rule is undoubted that checks deposited in a bank for collection remain the property of the depositor. Clark Sparks & Sons Mule, &c., Co. *vs.* Americus National Bank, 230 Fed., 738; Richardson *vs.* New Orleans Coffee Co., 102 Fed., 785; Philadelphia *vs.* Eckels, 98 Fed., 485; Fifth National Bank *vs.* Armstrong, 40 Fed., 46; Blair *vs.* Hill, 165 N. Y., 672; Perth Amboy Gas Light Co. *vs.* Middlesex County Bank, 60

N. J. Eq., 84; South Park Fidelity, &c., Co. *vs.* Chicago, Great Western R. Co., 75 Minn., 186.

In 7 *C. J.*, 599, the law is stated as follows:

> "One depositing paper in a bank may part with his title at the time of such deposit by a special agreement *or by an indorsement in blank;* and the general rule is that, where such paper is indorsed in blank, the first bank or any other bank through which it may pass, indorsed in the same manner, acquires a legal title * * *."

It is our opinion that when the bankrupts received this check payable to their order without restriction and credited it in the petitioners' checking account, the relation of debtor and creditor was thereby established on June 14, 1923. If not established then, there can be no question but that it was established on June 15th, when the check was collected. And as the petition in bankruptcy was not filed until June 16th there can be no doubt that the receiver in bankruptcy, and not the petitioners, was entitled to the proceeds of the $3,000 check.

THE TWELVE HUNDRED AND NINETY-FOUR DOLLAR CHECK.—This check may be found in the margin.[1]

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[1] "*Cashier's Check.*

"NEW YORK, *June* 15, 1923.

"The National City Bank of New York pay to the order of Knauth, Nachod & Kuhne, New York—$1,294.00—favor N. Latzko & A. Popper, Budapest—one thousand two hundred ninety-four and 00/100 dollars.

"Payable only through New York Clearing House.

"N. G. LENFESTEY,
"Cashier."

"J. W. ALLALE,
"Asst. Cashier."

"No. F. T. 261,365."

The petitioners alleged in their petition that on June 15, 1923, they caused the National City Bank of New York to deliver to the bankrupts this check to be collected for the account of the petitioners, and that it was to be so collected appears on the face of the check itself. For the words "Favor N. Latzko and A. Popper, Budapest" seems to us, on the whole, not to differ in effect from "Collect for N. Latzko and A. Popper, Budapest." A check so drawn cannot be said to be freely negotiable. Any payee to whom it was indorsed would take the proceeds when collected not for himself but for N. Latzko and A. Popper.

The bankrupts received the check on June 15, and on the same day they indorsed it in the manner disclosed in the margin.[1]

An examination of the check and the indorsement thereon disclosed to the American Exchange National Bank that it did not thereby acquire title to the check and that the proceeds did not belong to it or to the indorsers but to N. Latzko and A. Popper. The nature of the transaction was not affected by the fact that the bankrupts when they received the check credited it, on June 15th, in the account of the petitioners, or that the subsequent indorsee, the American Exchange National Bank, when they received the check on June 15th, at once credited it in the account of the bankrupts. The bank did not receive the proceeds until June 16, and when they received it it was not as their money and not as the money of the bankrupts, but as the money of N. Latzko and A. Popper, the petitioners herein. The right of the petitioners to the proceeds of the check is not to be defeated by the fact that the bankrupts credited it in the petitioners' account before it was collected, or by the fact that the American Exchange Bank

[1] "Pay to American Exchange National Bank or order. June 15, 1923. Knauth, Nachod & Kuhne, New York, N. Y. 1-548. 1-548."

credited it in the indorser's account. They might do so at their own risk, but not at the risk of the petitioners. The proceeds of the check, whenever it was collected, belonged to N. Latzko and A. Popper. And nothing the bankrupts could do prior to its collection could deprive them of their right to the fund.

In 1860, in Lee *vs.* Chillicothe Branch of State Bank, 15 Fed. Cas., 151, case No. 8187, Mr. Justice McLean (of the supreme court), sitting as circuit justice, had before him bills drawn by certain persons at Chillicothe, Ohio, on Edwin Ludlow, of New York, as cashier of the Ohio Life Insurance and Trust Company, payable to the order of the defendant, indorsed, "Credit my account. James B. Scott, Cashier." The indorsement was held to be restrictive and put an end to the negotiability of the bill. It was an appropriation of the proceeds of the note which rendered any other appropriation of them illegal. It was said that if a bill be restrictively indorsed a subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. "He is a mere agent and trustee for his principal, and whoever takes the money holds it under a similar trust."

In Bank of the Metropolis *vs.* First National Bank of Jersey City, 19 Fed., 301, in the Circuit Court for the Southern District of New York, the plaintiff sent the checks to the Mechanics' National Bank of Newark for collection, with the qualified endorsement: "For collection; pay to the order of C. L. Baldwin, cashier." The Newark bank sent the checks for collection to the defendant. After the defendant received the checks the Newark Bank became insolvent. Judge Wallace held that the indorsement by plaintiff "for collection" was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds to

another. He said, "As was held in Cecil Bank *vs.* Bank of Maryland, 22 Md., 147, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection."

In re Jarmulowsky, 249 Fed., 319, a depositor indorsed checks in blank and received credit for the same in his passbook. The book contained a notice that "deposits of check shall not be drawn against until collected." These checks were redeposited to their own account in other banks and were in due time collected, but collection had not been made when the receiver in bankruptcy took possession of the banking-house in which the original deposits were made. This Court held that in the absence of the special agreement between the depositor and the bank the title to the checks would have passed to the bank, and the bank would have become merely a debtor to the depositor for the amount entered in the passbook. The question presented was whether a depositor who is credited with the face of checks which he has agreed not to draw against until they shall been collected, has by the act of deposit parted with the title to the checks so deposited. Under the circumstances stated, this Court thought that the course of business shown created the relation of principal and agent and was in effect the same as though the checks had been indorsed "For collection and deposit to the account of the depositors." The court pointed out that if prior to the bankruptcy proceeding the agency had been fulfilled by collection of the checks, the moment the bank got the money on the checks the relation of debtor and creditor would have arisen.

In White *vs.* Miners' National Bank, 102 U. S., 658, a draft was indorsed "Pay to A or order for account of B." The court held that by the terms of the indorsement A became merely the agent of B for the collection

of the money. The plaintiff relief on two propositions. The first of these is that words are merely directory and capable of explanation, and when it is shown by parol testimony, as in this case, that the plaintiff bought and paid full value for the draft, with the understanding that he was buying it as commercial paper, with the usual incidents of such a transaction, the indorser is liable in the usual manner, notwithstanding the words we have quoted. The other proposition is that such is the custom of bankers who deal in such paper in New York, where these drafts are payable, and that the custom must control the construction of the contract. Mr. Justice Miller writing for the court, after stating the two propositions on which the plaintiff relied, said:

> "We are not satisfied that either of these propositions is sound.
>
> "The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make White the agent of the bank for the collection of the money.
>
> "If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it.

> "But we are aware of the necessity of proceeding with great caution in a case of first impression in regard to questions affecting commercial transactions, and we do not, therefore, decide this one, because we do not think it absolutely necessary to the case. For assuming this to be correct, we think the plaintiff was still entitled to recover more than he did."

The legal effect of the transaction was merely to enable White to collect the money for the bank, and it was held that where A, the payee of a check, indorses it to B "for account of A" B does not get title to the check, but is merely the agent to collect it for A's benefit. It is our understanding that if A deposits a check in a bank in which he has a checking account, and endorses it for his account, and the bank credits it to his account, the title to the check passes to the bank and it becomes a debtor to the depositor for the amount thereof.

At the argument emphasis was placed upon the allegation made by petitioners in their petition that they caused this check to be delivered by the National City Bank to the bankrupts, and we were told that the effect of the transaction must therefore be the same as though this check had been brought in by the petitioners. And that if the petitioners had brought it in and the bankrupts had at once placed it to the credit of the petitioners the relation of debtor and creditor would then and there have been established between them. It may be true that if petitioners had presented the check for collection and it was agreed between them and the bankrupts that it was to be credited before collection, such would have the effect of the transaction. But there was no such agreement made between them or on their behalf.

It is our opinion that the words on this check, "Favor N. Latzko and A. Popper, Budapest," restricted the

payee's power over the check. The words were equivalent to an indorsement for collection. A check made payable to a payee in favor of another is not freely negotiable and the payee holds it as an agent until he has collected and credited it. As this check was not collected until June 16, 1923, "during banking hours," we think the money collected on the check was the property of the petitioners at the time the petition in bankruptcy was filed on the morning of that day at 9.30 a. m. and therefore did not pass to the receiver in bankruptcy.

THE FIFTEEN THOUSAND DOLLAR CHECK.—This check may be found in the margin.[1]

The petitioners alleged in their petition that on June 15, 1923, they caused Goldman, Sachs and Company to deliver to the bankrupts this check "to be collected" by the latter for the account of the petitioners. This allegation was in terms similar to that made respecting the $1,274 check above considered. But the check which was introduced in evidence differs from that check in that it does not disclose that it was to be collected for the petitioners.

At the time this check was delivered to the bankrupts they accompanied it with a letter explaining that

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[1] "Goldman, Sachs & Co.

"No. 69619. NEW YORK, *Jun.* 15, 1923.

"The Bank of America pay to the order of Knauth, Nachod & Kuhne $15,000, fifteen thousand dollars.

"J. M. HUMPHREY."

"Passed. F. W. Y."

it was for account of petitioners. The letter is in the margin.[1]

On receipt of the check, on June 15th, the day prior to the filing of the petition in bankruptcy, the bankrupts credited it to the account of the petitioners. They on the same day indorsed the check "Pay to American Exchange National Bank or order," and delivered it to that bank. And that bank also on the same day credited the bankrupts with the amount of the check in the bankrupts' account. But the check was not actually collected until the following day "during banking hours." The petitioners state in their petition that this collection was made after the petition in bankruptcy was filed, but as they also allege that the petition was filed on June 15th, and the facts show that it was not filed until June 16th, we do not know whether collection was actually made before or after the filing of the petition. And in the view we take of the matter it is unimportant whether collection was made on June 16th, prior to the hour when the petition in bankruptcy was filed, or on a later hour on the same day.

The important fact is that this $15,000 check is on its face a straight unrestricted cashier's check payable to the order of the bankrupts. The petitioners state they caused Goldman, Sachs & Company, as their agents, to deliver it. The letter which Goldman, Sachs & Company sent with the draft simply amounted to an explanation to the persons to whose order it was drawn,

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[1] "NEW YORK, *June* 15, 1923.

"Knauth, Nachod & Kuhne, New York:

"We hand you herewith our check for fifteen thousand dollars for account of Latzkopper, Budapest, by order of Julius Baer & Co., Zurich, as per cable, June 15, from same.

"Please sign the attached receipt and return to bearer.

"$15,000.00. GOLDMAN, SACHS & CO."

that it was to be placed in the account of the petitioners. This they did as the agents of the petitioners. The legal effect of the transaction was the same as though the petitioners had themselves deposited the check "for our account" with the bankrupts on June 15th and the latter had at once credited it to the petitioners, and then on the same day transferred the title to the check to the American Exchange National Bank, which on the same day credited it in the bankrupts' account. That transaction made the American Exchange National Bank the owner of the check on June 15th and the proceeds when collected on June 16th belonged not to the petitioners or to the bankrupts but to the bank, which was the owner of the check when it was collected. We think the transaction is governed by the rule laid down in the Burton case, and that the relation between the petitioners and the bankrupts on June 15th, when this check was credited by the latter to the former, was that of creditor and debtor, and that the proceeds of this check when it was collected on June 16th did not belong to these petitioners. The finding of the court below, as to this check, was not erroneous.

The authorities cited in what we have said respecting the check for $3,000 are equally applicable to this check for $15,000.

Before concluding this opinion we may remark that while the petitioners alleged in their petition that at the time the bankrupts accepted the checks and deposited them they knew full well that they were insolvent and unable to meet their obligations, and that they knew of the preparation of the original involuntary petition in bankruptcy filed against them.

It was also alleged that at the time the checks were delivered to them the bankrupts wrongfully, fraudulently and with intent to defraud the petitioners held

themselves out as a solvent and solid banking-house, whereas they were insolvent and unable to pay their debts.

The answer interposed by the trustee denied any knowledge or information sufficient to form a belief as to the allegation. This was not an admission of the truth of the petitioners' allegation and was sufficient to put the petitioners to their proof. 1 Encyc. of Pl. & Pr., 947; Federal Equity Practice, vol. 1, sec. 726.

If the bankrupts knew they were hopelessly insolvent and could not go on when they received the checks, and credited the same in the accounts of the petitioners, they acted fraudulently in doing what they did and the petitioners would be entitled to rescind the transactions involved and the bankrupts would hold as trustees *ex maleficio* subject to the petitioners' right of reclamation. St. Louis & San Francisco Railway Company *vs.* Johnston, 133 U. S., 566. The mere fact of insolvency is not enough. The insolvency must be of such a character that it was manifestly impossible for the bankers to continue in business and meet their obligations and that fact must have been known to them when they accepted the deposits. Fidelity & Deposit Co. *vs.* Kelso State Bank, 287 Fed., 827, 830; Quin *vs.* Earle, 95 Fed., 728. But the burden was on the petitioners to show these facts and this they have not done. The record does not disclose that any evidence was introduced before the special master in support of the allegations that the bankrupts knew they were insolvent and could not go on when they received the checks and credited them in the petitioners' account.

The decree is affirmed as to the checks for $3,000 and $15,000, and is reversed as to the check for $1,294.

APPENDIX 2.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In re OSCAR L. GUBELMAN ET AL., *Bankrupts; Ex Parte* KARL RÖCHLING *et al., Appellants,* MIDDLETON S. BORLAND, *Trustee, Appellee.*

Before Hough, Manton, and Hand, Circuit Judges.

Appeal from an order in bankruptcy of the District Court for the Southern District of New York dismissing the petition or the firm Gebrueder Röchling to reclaim the proceeds of two cheques which came into the possession of the trustee in bankruptcy.

Henry G. Hotchkiss, for the appellants.
George G. Ernst, for the appellee.

HAND, *Circuit Judge:*

This case presents exactly the same situation, with a single exception to be noted, as existed in respect of the second cheque in *In re* Gubelman, *ex parte* Latzko & Popper, decided by this Court on December 7, 1925. There the cheque read: "Pay to the order of Knauth, Nachod & Kuhne, favor of N. Latzko & Popper." Here one cheque read: "For account of Röchling Bank," and the other, "% Gebt. Röchling." We held that "Favor of" was equivalent to "collect for," and it seems to us even plainer that "for account of" is as broad. Indeed this was the form of the cheque in White *v.* National Bank, 102 U. S., 658. If the drawer chooses to make the payee a fiduciary he establishes that relation when the payee accepts it, at least until

the beneficiary repudiates it, or unless his arrangements with the payee forbid. There can be no question that the drawer has limited the payee's free disposal of the cheque in the interest of another, and that is enough.

However, as we have just said, there is one difference between the case at bar and *ex parte* Latzko & Popper. There the proof was that although the depositors' cheques were always at once credited to their account, their practice had been never to draw upon them until collection. Here the cheques were also credited at once, but it does not appear what the practice was as to drawing against them. As there was no agreement shown in either case to wait or not to wait until collection we regard any distinction as immaterial. In addition, not only were the items themselves at once credited, but interest upon them as well from the time of their receipt. This too we think immaterial. The immediate credit of such paper is itself evidence of the creation of a debt from the bank to its depositor, and on its face presupposes a purchase of the cheque. But such an entry will not control the form of the paper. We do not see that it adds anything of substance that interest has also been credited. Such entries are not kept in suspense or entered "short," but are reversed, if the item be dishonored. The trustee must indeed go so far, and does, as to say that if these cheques had been stopped, the claimants could notwithstanding have insisted upon drawing down their amount, because they were not endorsers. Yet this could not have been done if their face had been merely credited to the account. It appears to us that to make the added credit of interest so important is to deal in unrealities. When an account bears interest it is as natural to begin to credit interest at once as to credit the item at all. Any distinction seems to us gratuitous.

The cases do not help very much. In Beal *v.* Somer-

ville, 50 Fed. Rep., 647 (C. C. A. 1), no interest was credited, nor was there an agreement that the depositor might draw at once. In First National Bank *v.* Armstrong, 40 Fed. Rep., 46, interest was indeed credited, but the credit was entered "subject to payment." National Butchers Bank *v.* Hubbel, 117 N. Y., 384, is closer, because although the bank did not credit interest, it remitted weekly, regardless of collections, relying upon its ability to reverse the entries, if any item were dishonored. That seems a stronger case for the assignee than this at bar is for the trustee.

In general we are disposed to make the form of the paper the test. We do not of course mean that an express agreement will not change what would otherwise be a trust into a debt. But it seems to us unreasonable to build up agreements, almost certainly factitious, upon the basis of the bank's book-keeping, even when this on its face contradicts the legal results ascribed to the transactions. There must be better evidence of an agreement to change the intent otherwise imputed.

Order reversed; cause remanded with instruction to award the claimant a preferred claim on both cheques.

FILED
APR 22 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM 1926.

No. 34

EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,

Petitioner,

against

CARL ROCHLING, *et al.*, Trading as GEBRUEDER ROCHLING,

Respondents.

BRIEF FOR RESPONDENTS

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Supreme Court of the United States

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee in Bankruptcy of Knauth, Nachod & Kuhne,
Petitioner,

against

CARL RÖCHLING, *et al.*, trading as GEBRUEDER RÖCHLING,
Respondents.

BRIEF FOR RESPONDENTS

I. RESPONDENTS' STATEMENT OF THE CASE.

The appellant's brief correctly states the ground for jurisdiction and the citation of the previous opinions in this case and for this reason these matters are not repeated herein.

The appellant is also correct in stating that there is no dispute of the facts, which are found either in the pleadings or in the stipulation of facts. The respondents desire to add to the statement made by the appellant certain facts appearing in the record that are not cited in the appellant's otherwise correct exposition of the facts.

THE NATIONAL BANK OF COMMERCE CHECK.

As appears by reference to the photostatic copy in the record (Exhibit D; R-13) there is printed on the face of

this check, in addition to the words set out in the appellant's brief, the words "Through the New York Clearing House."

THE NATIONAL CITY BANK CHECK.

As appears by reference to the photostatic copy of the check (Exhibit I; R-15), there is printed on the face of this check, in addition to the words set out in appellant's brief, the words "Payable only through the New York Clearing House."

SPEYER & CO. CHECK.

On June 15, 1923, a check for $30,000. was received from Speyer & Co. by Knauth, Nachod & Kuhne (known as and frequently referred to herein as K. N. & K.) for the account of Röchling (R-23).

The amount of this check was credited by Knauth, Nachod & Kuhne to the account of Röchling on June 15, 1923 (R-23). After the appointment of a receiver for Knauth, Nachod & Kuhne payment on this check was stopped pursuant to instructions given by Speyer & Co. (R-23). After stoppage of payment on this check the credit to the account of Röchling was reversed and the sum of $30,000. was subtracted from the balance then appearing on the books of Knauth, Nachod & Kuhne to the credit of Röchling (R-23).

ITEM OF INTEREST.

While it is true, as stated in appellant's brief, that an entry was made on the books of Knauth, Nachod & Kuhne that respondents were entitled to interest on the National Bank of Commerce check and the National City Bank check

on June 15, 1923, it should be added that it was *the receiver*, after the bankruptcy, who in preparing a statement of the account of the respondents with Knauth, Nachod & Kuhne as of the close of business on June 15, 1923, included interest for one day on the National Bank of Commerce and National City Bank checks (R-22). It was also *the receiver* who reversed the credit of the Speyer & Co. check for $30,000. and did not include interest thereon for one day (R-23).

II. SUMMARY OF RESPONDENTS' ARGUMENT.

A. The words "for account of" and those directing payment through the New York Clearing House are restrictive, preventing the bankrupts from obtaining title to the checks or their proceeds prior to the bankruptcy, and entitling the respondents to recover the traced proceeds held by the Trustee in Bankruptcy.

1. Early English authorities decided that the words "for account of" were restrictive.

Treuttel v. *Barandon* (1817), 8 Taunt. 100;
Coxe v. *Harden* (1803), 4 East 211.
Lloyd v. *Sigourney* (1829), 5 Bing. 525.

2. The modern English rule is the same in cases of "crossed cheques".

The Laws of England, by Lord Halsbury (1907), Volume 1, page 569; Volume 2, page 480;
Morse on Banks and Banking (6th Ed.), Sec. 245.

3. Early American Federal and State cases follow the English rule.

e. g. Lee v. *Chillicothe Bank* (1860), 15 Fed. Cas. 151;
Leary v. *Blanchard* (1860), 48 Maine 269;
Blaine v. *Bourne* (1875), 11 R. I. 119.

4. The words "for account of" held to be restrictive by the United States Supreme Court in the case of *White* v. *Miner's National Bank* (1881), 102 U. S. 658.

5. The statements in the case of *White* v. *The Bank* that the words "for account of" are restrictive, have been regarded as the law of the case by subsequent decisions of the Supreme Court and the lower Federal courts, and the courts of the States.

e. g. Commercial National Bank v. *Armstrong* (1892), 148 U. S. 50, 57;

Old National Bank of Evansville v. *German American National Bank of Peoria* (1894), 155 U. S. 556, 562;

The Nyssa-Arcadia Drainage District v. *The First National Bank* (D. C. D. Oregon) (1925), 3 Fed. (2nd.) 648.

6. The decisions of the Supreme Court of the United States and other jurisdictions establish the proposition that the legal restrictive effect of the words "for account of" and "for collection" are identical.

e. g. Old National Bank of Evansville v. *Bank* (1894), *supra;*

The Nyssa-Arcadia Drainage District v. *Bank* (1895), *supra;*

Bank of Metropolis v. *First National Bank of Jersey City* (C. C. S. D. N. Y.) (1884), 19 Fed. 301.

7. The restrictive effect of the words "for collection" are recognized in practice by the New York Clearing House.

Paton's Digest of Legal Opinions and Banking Law, Section 2747.

8. The words "for account of" are restrictive within the definition of the Negotiable Instruments Law of New York.

9. The effect of the restrictive wording was to prevent Knauth, Nachod & Kuhne from obtaining title to the checks or their proceeds.

10. The words "Through the New York Clearing House" and "Payable Only Through the New York Clearing House" are also restrictive.

B. Nothing in the dealings of the parties nor in the circumstances surrounding the case in any way changes the legal effect of the wording appearing on the checks.

1. Lloyd's Bank and The Swiss Bank were liable to respondents for any delay in payments that might arise.

2. The reversal of the entries in the case of the Speyer check indicate the equivocal nature of the credit of the check and entries for interest.

3. The crediting of the checks does not affect the restrictive quality of the words appearing thereon.

National B. & D. Bank v. *Hubbell*, (1889), 117 N. Y. 384;

In Re: Jarmulowsky, (C. C. A. 2nd) (1918) 249 Fed. 319;

Beal v. *City of Somerville*, (C. C. A. 1st) (1892) 50 Fed. 647.

4. The entries relating to interest are equally insufficient to change the legal consequences of the wording on the face of the checks.

Fifth Nat. Bank v. *Armstrong* (C. C. E. D. Mo.) (1889), 40 Fed. 46;

Morse on Banks and Banking, (6th Ed.) Sec. 658 (c).

5. The facts in the present case bring it within the authority of *White* v. *The Bank* and not within the purview of *Burton* v. *United States* (1904), 196 U. S. 283.

III. ARGUMENT.

A. The words "for account of" and those directing payment through the New York Clearing House are restrictive, preventing the bankrupts from obtaining the title to the checks or their proceeds prior to the bankruptcy, and entitling the respondents to recover the traced proceeds held by the Trustee in Bankruptcy.

The subscriptions on the two checks in the present case are as follows:

National Bank of Commerce Check.

"Pay to the order of Knauth, Nachod & Kuhne $30,000. *for account* of Röchling Bank, Gebt. Frankfort on Main.

Through New York Clearing House" (Exhibit D, R-13).

National City Bank of New York Check.

"Pay to the order of Knauth, Nachod & Kuhne, New York $30,000. *a/c* Gebt. Röchling, Frankfort on Main.

Payable only through New York Clearing House" (Exhibit I; R-15).

The underscored words "for account of" and "a/c" are the ones to which attention is directed. These particular words have undoubtedly been in common use for a very long time and during the course of the past one hundred years frequently have been subjected to judicial interpretation. As a result the legal effect of such phraseology has been clearly defined by a long line of decisions all reaching the same result.

1. Early English Cases.

One of the earliest cases is that of *Treuttel* v. *Barandon* (1817), 8 Taunt. 100, in which the Court of Common Pleas held that an indorsement "pay to J or order *for account* of N" constituted a restrictive indorsement enabling N, the plaintiff, to recover the indorsed bills of exchange in an action of trover, against the defendant, who sought to hold them for a debt due him from J. The Court observed that the indorsement "*for account*" was one that had been known to commerce and law for many years, and had always been regarded as being restrictive in its effect. See also *Coxe* v. *Harden* (1803) 4 East 211; *Lloyd* v. *Sigourney* (1829) 5 Bing. 525.

2. Modern English Rule.

The rule thus early established has persisted in England and has been crystalized under judicial decisions and acts of Parliament in the category known as crossed cheques.

See *Halsbury, Law of England*, Vol. I, p. 569; Vol. II, p. 480;
Morse on Banks & Banking, (6th Ed.), Sec. 245;
Farmers Bank v. *Johnson, King & Co.* (1910) 134 Ga. 486.

Appellant lays stress on the rule enunciated by the House of Lords in 1858 in the case of *Foley* v. *Hill* (1858) 2 H. L. 28 that the relation between depositor and bank is ordinarily that of debtor and creditor. This is all very well, provided it is recognized that there is an equally clear rule known from before 1817 until today, that restrictive wordings on commercial paper establish something in the nature of an agency between depositor and bank. The two rules are parallel and do not conflict with each other. But the rule of *Foley* v. *Hill* has no application to the case at bar, whereas the other rule controls it.

3. Early American Federal and State Decisions.

Apparently a case did not arise in the United States until about 1860. But in that year the Circuit Court for the Southern District of Ohio examined the question in the case of *Lee* v. *Chillicothe Branch of State Bank*, 15 Fed. Cas. 151. Mr. Justice McLean of the Supreme Court sitting as Circuit Judge there held that an indorsement on a bill of exchange reading "*credit my account*" was restrictive. He held that the particular indorsement belonged in the same category with such indorsements as: "*Pay to A for my account*", "*Pay to AB for the use of CD,*" which the Court described as admittedly restrictive.

The Supreme Court of Maine in the same year, in the case of *Leary* v. *Blanchard*, 48 Me. 269, held that the indorsement "pay to A *for the account* of payee" was restrictive.

In 1875 the Supreme Court of Rhode Island in the case of *Blaine* v. *Bourne*, 11 R. I. 119, decided that the indorsement, "Pay JC or order *for account of B,*" constituted a

restrictive indorsement, preventing JC from obtaining title to the instrument.

4. The decision of the Supreme Court in the case of White *v.* Miners Nat. Bank.

It will thus be seen that when the question first came before the Supreme Court in 1881, there already existed a body of authority in this country and in England, which had uniformly decided that the words "*for account of*" or variations of such words, were restrictive in their effect.

In the case of *White* v. *Miners Nat. Bank* (1881) 102 U. S. 658, the plaintiff purchased a draft indorsed as follows: "Pay S. V. White or order *for account* Miners National Bank, Georgetown, Col." The draft was not paid at maturity and White sued.

It was contended that the words of indorsement were merely explanatory and that White actually had title to the check. It was further argued that a custom in the City of New York entitled him to payment notwithstanding the effect that might otherwise be given to the particular wording. These contentions were disposed of by Mr. Justice Miller, writing the opinion for the Court, as follows:

> "We are not satisfied that either of these propositions is sound.
>
> The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay to the indorsee, for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary

> meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White the agent of the Bank for the collection of the money."

Continuing the court examined the contention that there was a question of mutual mistake in the case which should have been left to the jury. The thirteenth instruction asked by the plaintiff and refused by the court properly raised this issue. The Supreme Court held that this was error and sent the case back to the lower court.

Mr. Justice Miller says that,—

> * * * "There is evidence that neither White nor Brownell noticed the restrictive words of the indorsement."

This being so the court says that if the judge below was right in holding the indorsements restrictive the question of mutual mistake was properly raised. In sending the case back under these circumstances the court of necessity was bound to consider whether the judge in construing the words as restrictive in their legal effect, was guilty of a misstatement of the law. If he was, it is inconceivable that they should not have corrected it. The fact is that far from correcting it, they allowed his statement to stand but said that on his statement the question of mutual mistake of the parties was a question that the jury should pass upon.

The appellant seeks to distinguish the *White* case and all others related to it by stating in his brief that they relate to a case of an indorser indorsing to the indorsee for the indorser's benefit.

In the case at bar the appellant argues that the rights are those of the indorsee and a third party. The appellant also argues that in the *White* case and others the indorser, for whose account the indorsement was made, does not appear to have an account with the indorsee.

These attempted distinctions are without merit. The very earliest authorities cited, and the case of *Treuttel* v. *Barandon*, from which the others, including the *White* case have stemmed, are cases where the rights of a third party other than the indorser, are protected by a restrictive indorsement.

The only difference in legal effect between the case where the indorsee bank has no account for the indorser and where it has, is that in the former case the title to the funds after collection remain in the indorser. But when the indorser has an account with the indorsee, then after collection the indorsee mingles the proceeds of the other funds and the debtor-creditor relationship comes into being.

But even under the appellant's own distinction the *White* case must be regarded as fully controlling. The absence of an account, which is the point of distinction, is found here. In the present case the National Bank of Commerce and the National City Bank of New York, who are the indorsers, did not have a general account with Knauth, Nachod & Kuhne, who are the indorsees.

5. Interpretation of the *White* case by subsequent decisions.

An examination of subsequent authorities that refer to the *White* case makes it perfectly clear that the foregoing

quotation has ever since been regarded as the law of the case.

See *Daniels (6th Ed.) Negotiable Instruments,* Sec. 698-A.

In 1892 the Supreme Court had to pass on the question of the effect of an indorsement reading "Pay Fidelity *for collection* for Commercial Bank," in the case of *Commercial National Bank* v. *Armstrong,* 148 U. S. 50, 57, (s.c.) 39 Fed. 684, 690. The court held that these words constituted a restrictive indorsement, citing as its first authority the case of *Sweeney* v. *Easter* (1863) 68 U. S. 166, wherein the opinion was written by Judge Miller, who also wrote the opinion in the *White* case. Continuing, the court said:

> "And in *White* v. *Miners National Bank of Georgetown,* 106 U. S. 658, where the indorsement was 'for account,' the same justice, speaking of the indorsement, said:
>
> 'It does not purport to transfer the title of the paper or the ownership of the money when received.'
>
> The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity." Citing *National Butchers & D. Bank* v. *Hubbell,* 117 N. Y. 384 (discussed hereafter).

Three years later, in the case of *Old National Bank of Evansville* v. *German American National Bank of Peoria,* (1894) 155 U. S. 556, 562, the Supreme Court again cited the *White* case as its authority on the question of restrictive indorsements.

Without extended comment reference is made to the following cases, all of which specifically refer to and rely upon

the *White* case as their authority in deciding that the words "*for account of*" or similar expressions are restrictive.

In re *Armstrong* (C. C. S. D. Ohio W. D.) (1888), 33 Fed. 405;

Fifth National Bank v. *Armstrong* (C. C. E. D. Mo. E. D.) (1889), 40 Fed. 46;

First National Bank v. *Armstrong* (C. C. S. D. Ohio W. D.) (1890), 42 Fed. 193;

Beal v. *Somerville* (C. C. A. 1st) (1892), 50 Fed. 647;

U. S. v. *American Exchange National Bank* (D. C. S. D. N. Y.) (1895), 70 Fed. 232.

See also:

National Butchers and Drovers' Bank v. *Hubbell* (1889), 117 N. Y. 384; and

In re *Jarmulowsky* (C. C. A. 2nd), (1918), 249 Fed. 319, fully discussed, *infra.*

The latest case which has examined the authority of the *White* case is *Nyssa-Arcadia Drainage District* v. *The First National Bank* (D. C. D. Ore.) (1925), 3 Fed. (2d) 648, in which Judge Wolverton states the holding therein as follows:

> "Nor does indorsement 'for account' purport to transfer the title of the paper or the ownership of the money when received. *White* v. *National Bank.*"

Other jurisdictions, often relying upon the *White* case, have arrived at the same result, in deciding that the words "*for account of*" or "*for collection*" are restrictive in their effect, preventing the passage of title to the paper or its proceeds.

First National Bank of Belmont v. *First National Bank* (1898), 58 Ohio State, 207;
Freiberg v. *Stoddard* (1894), 161 Pa. 259;
Hackett v. *Reynolds Lamberton Co.* (1886), 114 Pa. 328;
First National Bank of Clarion v. *Gregg & Co.* (1875), 79 Pa. 384;
Bank of Sherman v. *Weiss* (1887), 67 Texas 331;
Freemans National Bank v. *National Tube Works Co.* (1890), 151 Mass. 413.

See also:

Manufacturers Nat. Bank v. *Continental Bank* (1889), 148 Mass. 553;
Daniels on Negotiable Instruments (6th Ed.), 698 (A).

A striking point in all of the foregoing cases is the complete unanimity reached by the different courts. It frequently happens that with the great expansion of banking and the growing use of negotiable instruments many of the earlier decisions are found to conflict with those decided under changed and more modern circumstances. Not so here. The rule announced in 1817 has been adhered to without dissent.

6. THERE IS NO DIFFERENCE IN THE RESTRICTIVE EFFECT BETWEEN THE WORDS "FOR ACCOUNT OF" AND "FOR COLLECTION."

There can be no doubt that the effect of the words "*for collection*" on negotiable paper is restrictive. *Daniels on Negotiable Instruments* (6th Ed.), Sec. 698 (5). This was decided by the Supreme Court in the case of *Sweeney* v. *Easter* (1863), 68 U. S. 166, in which the opinion was written by Mr. Justice Miller, who wrote the opinion in the

White case as well. The decision thus reached has been uniformly followed by the Federal cases, *Old National Bank of Evanville* v. *Bank* (1894), *supra; Nyssa-Arcadia Drainage District* v. *Bank* (1925), *supra.* A late New York authority reaffirming this rule is *Bank of America* v. *Waydell* (1907), 187 N. Y. 115.

A corollary to this main proposition is the identical restrictive effect given by courts to the words "*for collection*" and "*for account of.*" Cases dealing with one phrase refer for their authority to those dealing with the other.

In *Commercial National Bank* v. *Armstrong,* 148 U. S. 50, 57, the Supreme Court considered the question of the status of commercial paper forwarded by one bank to another and indorsed "*for collection.*" In deciding that these words there were restrictive and that the collecting bank obtained no title to the paper or proceeds, the court not only followed the ruling in *Sweeney* v. *Easter, supra,* but relied equally upon the decision in the *White* case. A reading of the decision leaves no doubt that the court was of the opinion that the restrictive effect of the words "*for account of*" and "*for collection*" was the same.

The same conclusion is supported by the later case of *Old National Bank of Evansville* v. *The German National Bank of Peoria,* 155 U. S. 562.

To the same effect see *Freemans National Bank* v. *National Tube Works Co.,* 151 Mass. 413.

In the case of *Bank of Metropolis* v. *First National Bank of Jersey City* (C. C. S. D. N. Y.) (1884), 19 Fed. 301, the court decided that the words "*for collection*" were restrictive. In the course of the opinion, Judge Wallace said:

"But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of Gibson, C. J., 'a negotiable bill or note is a courier without luggage; a memorandum to control it, though indorsed upon it, would be incorporated with it, and destroy it.' *Overton* v. *Tyler,* 3 Pa. St. 348. The indorsement by plaintiff 'for collection' was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in *Cecil Bank* v. *Bank of Maryland,* 22 Md. 148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First Nat. Bank* v. *Reno Co. Bank,* 3 Fed. Rep. 257, paper was indorsed, 'Pay to the order of Hetherington & Co., on account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper, or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other. Other authorities in support of this conclusion are *Sweeney* v. *Easter,* 1 Wall 166; *White* v. *Nat. Bank,* 102 U. S. 658; *Lee* v. *Chillicothe Bank,* 1 Bond 389; *Blaine* v. *Bourne,* 11 R. I. 119; *Claflin* v. *Wilson,* 51 Iowa 15."

A reading of the following authorities (also cited under Par. 5) emphasizes this identity of the words "*for collec-*

tion" and "*for account of.*" All of these cases, as stated, rely specifically upon the *White* case as their authority, the courts in some instances passing upon the words "*for collection*" in others "*for account of*" with, however, a complete unanimity of opinion that such phrases are equally and interchangeably restrictive.

In re Armstrong (C. C. S. D. Ohio W. D.) (1888), 33 Fed. 405, "Pay Federal Bank or order *for collection for account of W.*";

Fifth National Bank v. *Armstrong* (C. C. E. D. Mo. E. D.) (1889), 40 Fed. 46, "Pay X *for collection of A.*";

First National Bank v. *Armstrong* (C. C. S. D. Ohio, W. D.) (1890), 42 Fed. 193;

Beal v. *Somerville* (C. C. A. 1st) (1892), 50 Fed. 647;

U. S. v. *American Exchange National Bank* D. C. S. D. N. Y.) (1895), 70 Fed. 232, "*for collection.*"

7. Recognition of the rule in the *White* case by the New York Clearing House.

The holding in the *White* case and similar decisions, has received practical recognition by the New York Clearing House. This is made clear by reference to *Paton's Digest of Legal Opinions and Banking Laws.* Mr. Paton is general counsel for the American Bankers Association and his views necessarily reflect a wide experience and intimate knowledge of this branch of the law. In Section 2747 of his work, he says:—

"Section 8 of Article 10 of the Constitution of the New York Clearing House Association reads as follows:—

> *'The members shall not send through the Exchange any checks, drafts, notes, bills of exchange or other items having thereon any qualified or restricted indorsement such as "for collection" or "for account of", or "pay any bank or banker or order", or other similar indorsements unless all indorsements thereon are guaranteed by the members of the association sending such items through the Exchange.'*

* * * * * *

The quoted provision of the Constitution of the New York Clearing House follows the decisions by the New York courts to the effect that where a check was raised or the indorsement forged and the item was indorsed to a bank for collection, the indorsee, appearing as agent only, was not responsible to the payor after it had paid over the proceeds to the principal." (Italics ours.)

See also:

First National Bank of Belmont v. *First National Bank* (1898), 58 Ohio State 207.

8. THE WORDS "FOR ACCOUNT OF" ARE RESTRICTIVE IN THE SENSE DEFINED BY THE NEGOTIABLE INSTRUMENTS LAW.

The following definition of a restrictive indorsement is found in Section 66 of the Negotiable Instruments Law of New York:

> "An indorsement is restrictive, which either:
>
> (3) Vests the title in the indorsee in trust for or to the use of some other person."

In the case at bar the writing on the checks directs that money is to be paid to K. N. & K. not for their own account but for account of Gebr. Röchling. Clearly under the Statute above cited, K. N. & K. hold title to the check "in trust for or to the use of" Gebr. Röchling.

9. THE EFFECT OF THE RESTRICTIVE WORDING WAS TO PREVENT KNAUTH, NACHOD & KUHNE OBTAINING TITLE TO THE CHECKS OR THEIR PROCEEDS.

Generally stated the effect of a restrictive indorsement or wording on negotiable paper is to prevent the indorsee from obtaining any title to it or its proceeds, except such title as is sufficient to collect the proceeds for the person in whose favor the indorsement runs.

The result is that where the paper has not been collected it may be recovered by the true owner. So in *Treuttel* v. *Barandon, supra,* where the indorsement was "Pay to J. or order *for account of* N" the court allowed N to recover in an action of trover against the defendant who sought to hold the paper for a debt due him from J. Again in *Blaine* v. *Bourne, supra,* the indorsement "Pay JC or order *for account of* B" was held to give no title in the instrument to JC.

In the *White* case the plaintiff *White* unsuccessfully sought to recover the proceeds of the draft for himself.

The rights of the true owner of paper indorsed *"for collection"* to recover the proceeds forwarded by a subagent bank to the collecting bank after bankruptcy is established in *Commercial National Bank* v. *Armstrong, supra; Bank of Metropolis* v. *First National Bank of Jersey City, supra.*

The other authorities cited are to the same effect.

In the instant case K. N. & K. received the checks before insolvency, but collection thereof was not effected until after the appointment of a receiver on June 16, 1923, and the proceeds came into the possession of the trustee in bankruptcy at a still later date. Under the authorities above cited it is submitted that the right of respondents to reclaim the proceeds traced into the possession of the trustee is clearly established.

10. THE WORDS "THROUGH THE NEW YORK CLEARING HOUSE" AND "PAYABLE ONLY THROUGH THE NEW YORK CLEARING HOUSE" ARE ALSO RESTRICTIVE.

On the face of the National Bank of Commerce check appears the words "Through the New York Clearing House" and on the National City Bank of New York check "Payable only through the New York Clearing House."

It is a well known fact of which the Court will take judicial notice that checks delivered on one day payable through the New York Clearing House are in fact not paid through that agency until the day following. That this was the fact in the instant case is evidenced by a stamp appearing on the back of the checks reciting "Received payment through New York Clearing House June 16, 1923,"—that is after a receiver had been appointed.

In the words of *Morse on Banks and Banking* (6th Ed.), Section 245, "there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the Clearing House and such a direction would be as valid and binding upon the bank as a direction to pay only to the order of a particular person."

In the case of *Farmers Bank* v. *Johnson King & Co.* (1910), 134 Ga. 486 an analogous situation was presented. The check in that case bore on its face a note that it was payable only at a particular bank in a particular town. The plaintiff sought to obtain payment elsewhere, which was refused. Suit was commenced on the check and the court in an opinion by Judge Lumpkin held that the plaintiff was not entitled to recover because the direction to pay at a particular bank was an integral part of the instrument relieving the defendant from liability unless this direction was strictly complied with.

A somewhat different situation is presented in the case of *Bank* v. *Bank* (1896), 118 N. C. 783. On the face of the check in that case there was printed a stipulation that it would not be paid to the X Company or its agents. It appeared that one of the agents of the X Company had presented the check, payment of which had been refused. The court held that the stipulation was a valid restriction and binding on the holder. The court likened the case to the situation presented by the British crossed cheques.

On this point the following quotations from *Paton's Digest of Opinions and Banking Law* support the contention herein urged.

> "Section 1423:
>
> Notation on check making it 'payable through Bank A' *cannot be disregarded or changed by custom'*. (Italics ours.)
>
> Section 1424: COLLECTION OF CHECKS 'PAYABLE AT PAR THROUGH NEW YORK CLEARING HOUSE'.
>
> It has been held by the courts that where a check has printed thereon a clause making it payable through a designated agency or channel of collection,

> if the check is presented through another agency the bank is justified in refusing payments.' "

In the case of *Third Bank* v. *Clark* (1877), 23 Minn. 263, there was a check endorsed "Pay X Company for collection for M Company". These words were commented on by the court as follows:—

> "An indorsement must be in writing. There can be no such thing as an indorsement wholly or partly in parol. The indorsement in the case is, in fact, restrictive and for that reason cannot be, nor be shown to be, absolute. What the indorser and indorsee *may believe intended by the indorsement, except so far as it is expressed in the writing, is of no consequence to this action.*" (Italics ours.)

The last portion of the foregoing quotation, which echoes in different words the quotation from the *White* case given above, is an apt answer to the appellant's strenuous efforts to nullify the words used, by inferences drawn from the acts of the parties.

In the present case K. N. & K. could not have insisted that the issuing bank, The National Bank of Commerce, or The National City Bank of New York pay the checks except through the New York Clearing House. As above explained this could not be accomplished on June 15th. Under the authority above recited the refusal of the issuing banks to pay except in due course through the Clearing House would not have furnished grounds for a suit by K. N. & K. More than that K. N. & K. would have been justified in resisting any demand that the checks be paid other than in the manner required by the directions on the face thereof.

Looking then to the wording on the checks there can be no doubt that by their tenor it was impossible in law,

as it proved to be in fact, to obtain the proceeds of the check until after the bankruptcy intervened. The only title that K. N. & K. had was title to collect the proceeds and as these did not come to its possession until after the appointment of a receiver they must be regarded as the property of respondents, provided, as is the case here, that they can be traced into the possession of the trustee in bankruptcy.

B. Nothing in the dealings of the parties nor in the circumstances surrounding the case in any way change the legal effect of the wording appearing on the checks.

As the Court states in *White* v. *The Bank,* the language on the face of the checks here "is without ambiguity and needs no explanation, either by parol proof or by resort to usage." Only one thing, therefore, can nullify the effect of the restrictive wording and that is the establishment of an agreement, express or implied, the essence of which shall be an obligation on the part of K. N. & K. and Röchling to disregard the plain meaning of the language employed. Admittedly there is no express agreement and it is submitted that there is no agreement to be implied from the facts surrounding the particular checks or the past course of dealing between the parties.

The particular checks were placed to the credit of Röchling on the books of K. N. & K. After the bankruptcy the receiver allowed a day's interest on these checks. The act of the receiver cannot better his position and this crediting of interest must be regarded as simply a carrying on of what the receiver believed had been done prior to the bankruptcy.

1. Liability of Lloyd's Bank and the Swiss Bank.

Prior to the bankruptcy interest had been allowed from the date of receipt by K. N. & K. of checks delivered under circumstances similar to those here.

But what were those similar circumstances under which credits were made and interest allowed on the books of K. N. & K.? (R. 12, 13, 15, 19, 20.) It is in evidence that it was in cases where Röchling had bought from some third person dollar exchange in advance,—that is to say, Röchling had contracted to buy from X Bank dollars at an agreed rate of exchange, payable at a certain future date. These dollars, it was the duty of X to deliver to Röchling on that certain future date at K. N. & K., New York. If delivery was not made on that date Röchling looked to X, not to K. N. & K., for the loss of interest, plus any other provable damage. Again, if payments on the checks were stopped it would be to X, not to K. N. & K., that Röchling would look. Under no possible angle of these circumstances is there any evidence to show that Röchling substituted the obligation of K. N. & K. for the obligation of X. The obligation of X continued.

Under the evidence in the case the fact that Röchling was contracting with the X Bank or banks in all its dealings was something of which K. N. & K. had knowledge or were chargeable with knowledge, since it is admitted that in the other cases beside those of the two checks, the circumstances being the same, K. N. & K. must have signed receipts which by their terms put them on notice that the checks were delivered by some one other than the respondents or their agent.

In short, K. N. & K. were always aware that the X Bank was under a contractual obligation to Röchling if the

X Bank failed to deliver by some particular day a certain sum of dollars at K. N. & K. Failure to so deliver, resulting in loss of interest, would therefore constitute a breach of contract for which the X Bank would be liable. Under these circumstances K. N. & K. was in an excellent position to credit the checks when received and to allow interest from date thereof, well knowing that whatever might subsequently happen by reason of stoppage of payment or failure to deliver at a proper and previously agreed date, Röchling would have recourse to the X Bank. Thus K. N. & K.'s actions were nothing more than the granting of gratuitous favors, acceptable, no doubt, to Röchling, but favors none the less, since in the event of loss the obligation to make good rested not on K. N. & K., but on some other person.

In the present case had Lloyd's Bank failed to live up to its obligation on June 15, 1923, assuming for the moment that the bankruptcy had not occurred it would be to Lloyd's Bank that Röchling would look. If the check sent at the instigation of Lloyd's Bank had not been delivered on the fifteenth, or if after delivery payment thereon had been stopped, the loss of interest and damages would have to be sought by Röchling from Lloyd's Bank, not from K. N. & K.

Suppose that the suit here was by Röchling against K. N. & K. for one day's interest on the two checks delivered on June 15th. Would not K. N. & K. say that there was no obligation on their part with relation to these $60,000 which Röchling desired to have in its account on June 15th? K. N. & K. could well say that the agreement with regard to these sums had been entered into independently by Röchling with some third person; that the obligation of that third person was of no concern to K. N. & K. and the fact

that K. N. & K. in times past under similar circumstances had allowed interest, did not obligate them in any way to do so in future.

2. The Speyer check.

But the crediting on the date of receipt by K. N. & K. and the allowance of interest does not give the full picture. It is in evidence that in the case of the Speyer check for $30,000 which was delivered on June 15th and credited to the account of K. N. & K., credit therefor was reversed when subsequently payment on the check was stopped (R-23). In reversing this entry it is not suggested that the receiver was acting because of any favored position granted him by law or that he was acting otherwise than in accordance with the procedure that K. N. & K. would have adopted if the bankruptcy had not intervened.

The uniqueness of the incident of the Speyer check is to be explained simply by the financial stability of the banks involved. As long as solvent banks sent checks that were invariably honored, K. N. & K. suffered no loss by making the credit entry and by allowing interest from the date of receipt since at all times both entries could be reversed and interest, if advanced, charged back against Röchling, if for any reason the checks from the usually solvent banks were not paid.

It is important in considering this phase of the case to remember that the checks in question here were not delivered to K. N. & K. by a depositor or its agent. They were delivered by a third person who, by reason of obligations owed to Röchling, attempted to discharge the same by delivering the checks in question through K. N. & K. This

fact, to which reference will be made later, distinguishes the present case from others where the facts disclose that the controversy involves a depositor and his own bank.

3. THE FORCE OF THE RESTRICTIVE WORDING IS NOT AFFECTED BY THE CREDITING OF THE CHECKS.

The conclusion that the facts in the present case do not alter the legal effect of the words appearing on the face thereof, is fully supported by the authorities. As will be seen, the same facts or simliar circumstances have unsuccessfully been urged heretofore in an effort to nullify the effect of the writing employed on checks or other negotiable instruments.

In the *White* case the court was asked to disregard the indorsement by reason of an alleged custom of bankers in the City of New York. The court, in its decision, accepted the suggestion of the existence of such a custom. Nevertheless, the court refused to allow this to override the plain meaning of the indorsement. This, of course, goes very far, in that it involves the question of custom, which by legal interpretation supposes a uniform practice generally adopted in a particular community, notorious in its use for a period of time, and known or presumed to be known by the parties to the particular case. And yet the court insisted that the writing must prevail.

It is pertinent at this point to revert to the case of *Third Bank* v. *Clark, supra,* where the court says:

> "What the indorser or indorsee may believe intended by the indorsement, except so far as it is expressed in writing, is of no consequence to this action."

Nevertheless the appellant's brief stresses the importance of examining the circumstances to determine the meaning of the words on the checks. There are limitations to the rule well expressed in the *White* case, in the quotation just made, and in many if not all of the authorities cited by the appellant.

But let us accept for the moment the appellant's thesis. What is the most significant fact surrounding the checks in this case? It is that two large and reputable New York banks, no doubt duly protected by the advice of competent counsel, chose words that for over a hundred years had been construed by the courts of England and America as being restrictive. No case has been adduced where the opposite result has been reached.

It is not a reasonable inference that these banks intended to have a different legal result by their use of these words than the one which had uniformly and repeatedly been given to them by the Courts.

If we shift our point of view to the respondents and the bankrupts the result is the same. They too, as reputable bankers in Germany and in the United States, dealing in New York, cannot be deemed to have used words to mean something diametrically opposite in effect from what those words had always been construed to mean.

The only answer that is suggested in the appellant's brief is the suggestion that the use of the words "for account" was the only way K. N. & K. would know where to deposit the check or its proceeds. But that answer is no answer at all. The result might readily have been achieved in a variety of ways without involving the patent results

that must flow if the words were inserted on the face of the check. For example, the check might have been drawn to K. N. & K. without qualification. Accompanying the check, in duplicate receipt form or otherwise, there might have been a paper reading in substance as follows:

> The accompanying check to your order is for the account of Gebr. Röchling in accordance with instructions received by us. But this information is directive only and is in no way to be construed as limiting the negotiability of the accompanying check nor as making you an agent for collection.

The method suggested is simply an adaptation of the practice instituted after the case of *Burton* v. *U. S.*, 196 U. S. 283, on which the appellant relies so strongly. After this case, holding that where depositors deposited checks to their order with banks where they had accounts, and the bank forthwith credited the same, the banks became owners thereof (subject to the right to charge back hereafter discussed), many banks had their bank books inscribed with a statement that checks were received but were credited only after collection. This practice appears in *In re Jarmulowsky*, 249 Fed. 319, more fully discussed hereafter.

A case that is markedly similar to the one at bar is *National B. & D. Bank* v. *Hubbell* (1889), 117 N. Y. 384. In that case the plaintiff bank, "*for a number of years* had been accustomed to forward to the firm of Wilkinson & Co. for collection, checks, drafts and notes, owing to plaintiff and made payable at different places in Syracuse, Wilkinson & Co. being correspondents of the plaintiff." The plaintiff,

upon receiving checks, etc., payable at Syracuse, indorsed them as follows:

> "Pay Wilkinson & Co., or order for coll., for account of National Butchers & Drovers Bank of the City of New York.
>
> W. H. Chase,
> Cashier."

The checks so indorsed were then forwarded under a covering letter reading as follows:

> "National Butchers & Drovers Bank.
> New York, 188 .
>
> Messrs. Wilkinson & Co.
>
> Dear Sirs:—
>
> Your favor of the inst. is received with enclosures as stated. I enclose for collection and credit bills as stated below.
>
> Respectfully yours,
>
> William H. Chase,
> Cashier."

The items so forwarded were charged on the books of the plaintiff against Wilkinson & Co. on the day on which they were sent.

> "On Thursday of each week Wilkinson remitted to the plaintiff, by a draft on New York, the amount standing to the credit of the plaintiff upon their books up to that time, less about three-sixteenths of one per cent. for their services. These remittances were generally made in the morning, *regardless of whether Wilkinson & Co. had at the time actually received the proceeds of all the checks, drafts, etc., which then*

stood upon its book credited to the plaintiff. This manner of doing business had been carried on for a number of years prior to the failure of Wilkinson & Co., and was understood by the plaintiff and was the existing arrangement." (Italics ours.)

Wilkinson & Co. made a general assignment for the benefit of creditors. The defendant assignee took control. The books showed certain sums credited to plaintiff's account which were actually received after the defendant had taken control. The amounts so received were paid out in good faith to the creditors of the firm and the action was brought by the plaintiff to recover the sum in question on the theory that title thereto had never passed to Wilkinson & Co. and, therefore, there was no title thereto in the defendant assignee.

The Court held that the indorsement passed no title and that Wilkinson & Co. "became simply the agent of the plaintiff to present the paper, demand payment thereof and remit to it."

The Court has this to say about the effect of the letter. That it "amounted simply to a direction to credit after the collection was made, and up to the time that the funds were actually received by the firm it certainly would make no alteration in the law relative to indorsements for collection only."

But here again as opposed to the meaning of the restrictive wording, there was interposed the plea that the course of dealing extending "for a number of years" prior to the general assignment altered the situation. On this point the opinion of Judge Peckham reads as follows:

> "Nor does the finding of the learned justice at Special Term as to the custom pursued between the

> parties alter the law in regard to the title to the paper before the funds arising from the payment thereof were actually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of bookkeeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received; because if any were not paid, such as went to protest were at once charged back upon the books of the firm against the plaintiff, and returned to it with the expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the amount of these collections until the collections were actually made and the proceeds received by them."

The case is particularly apt to the facts in the case at bar. There is the same limitation of wording, the same continuation of a course of dealing urged to be at variance with the meaning of the particular wording. Nevertheless the court holds that the forwarding bank did not lose title and become a mere creditor of the collecting bank.

But there is one marked point of difference. In the *Hubbell* case the court is dealing with a restrictive indorsement placed on the check by the depositor in a case where the depositor is suing his own bank. In the instant case it is not the check of the depositor but of a third person. If notwithstanding in the *Hubbell* case it was held that a course of dealing did not alter the meaning of the wording between depositor and bank, *a fortiori* would the same conclusion apply with respect to the checks of third persons, presented in the case at bar.

The facts and the holding of the case *In re Jarmulowsky*, (C. C. A. 2nd) (1918) 249 Fed. 319, are important. In that case the reclaimants deposited checks the day prior to the

bankruptcy, some drawn on out of town banks and others drawn on banks in New York. "Both depositors indorsed their checks in blank and received credit (i. e. the checks were not entered 'short') in the passbook for the face of the checks and both their passbooks contained the following notice: 'deposits of currency or coin may be drawn against after deposit, but deposits of checks shall not be drawn against until collected.' "

The receiver introduced evidence that one of the reclaimants had a so-called commercial account with Jarmulowsky "and that as a depositor of that kind he had been permitted to draw against uncollected checks, notwithstanding the passbook entries aforesaid." The Court held that no title passed to the bank. The fact of entry of full credit on the reclaimant's books and the indorsement in blank were not sufficient to establish title in the bank. The right of one of the reclaimants to draw immediately was disposed of by the Court in the following language:

> "Nor do we think the privilege said to have been extended to 'commercial' depositors like Bortz affords any guide to decision. It was a privilege, a favor, without consideration; it could have been retracted at any time, and cannot, therefore, be held to show any change in the legal relation assumed by the parties when petitioners became depositors in bankrupt's institution."

The right of the bank to charge back items originally credited was commented on as follows:

> * * * "The right to summarily charge back uncollected items even after full apparent credit on deposit, is thought inconsistent with any intent on the bank's part to become the owner of such items as those under consideration."

In conclusion the Court said that the course of dealings leads to the same result as if the checks had been indorsed "'for collection and deposit to the account' of the depositors."

The *Jarmulowsky* case goes farther than the *Hubbell* case. In the *Jarmulowsky* case we have a depositor indorsing the checks in blank to a bank with which he has an account, a credit entry immediately on the books of the bank and the right to check against it by one of the so-called depositors. Nevertheless the Court held that the depositor could reclaim.

The *Jarmulowsky* case quotes with approval the case of *Beal* v. *City of Somerville* (C. C. A. 1st) (1892), 50 Fed. 647. In that case the facts were as follows: A City Treasurer had for several years made deposits with the defendant bank without any special agreement. The checks when deposited were immediately credited to the City's account although there was no understanding to that effect. This immediate crediting was known to the City Treasurer. The custom was, in the case of the defendant bank and others in Boston, to allow depositors in some instances to draw their checks before checks deposited had been collected, and in some cases not.

After the bankruptcy the reclamation suit was brought for the proceeds of checks, all deposited and all indorsed "*for deposit.*" The Court upheld the right to reclaim. Judge Putnam stated that the immediate credit on the passbook "was a mere matter of convenience" and did not pass title to the bank. The Court insisted that the bank had failed to show that the plaintiff, the City, had an absolute right to check against the deposit "and that such right did not exist must be received by this Court as a matter of judicial knowledge."

4. Entries Relating to Interest.

In *Fifth National Bank* v. *Armstrong* (C. C. E. D. Mo.) (1889), 40 Fed. 46, the claimant bank sent to the Federal Bank a sight draft drawn on a third party indorsed "pay Federal Bank or order *for collection.*" It was the practice of the Federal Bank in its dealings with the claimant to credit the latter on the day of receipt for all drafts, checks, etc., payable at sight or on demand, *and the balance thus created was subject to be drawn on, and interest allowed on checks thus credited,* but if the paper was not paid it was charged back to the claimant. In the particular case, on receipt of the draft in question, the Federal Bank notified the claimant that it had been credited with the amount drawn, subject to payment, but the credit was not drawn against, nor were advances made on the faith of it. The Federal Bank sent a draft to its agent indorsed "for collection," and the amount of it was counted as a part of the Federal's reserve fund, though this fact was not known to the claimant. The court held that the indorsement was restrictive, that the Federal Bank acquired no title and that upon Federal's insolvency before notification of the collection of the draft, the claimant was entitled to the proceeds thereof in the hands of the collecting agent.

Part of the opinion of the court is as follows:

> "The contention is, however, *that the practice shown of crediting sight drafts, when received for collection, as cash, and the allowance of interest on daily balances into which such credits had entered, alters the case.*
>
> * * * * * *
>
> But if paper is indorsed 'for collection for account of the depositor,' and then deposited, and

> credit given, a different case is presented. The mere fact that paper thus indorsed is credited by a bank to the depositor as cash and the privilege accorded to him of drawing against the credit may not, as it seems, be sufficient to vest the bank with title to such paper.
>
> * * * * * *
>
> It was a restrictive indorsement and it must be assumed that that form of indorsement was adopted for a well defined purpose.
>
> *It may well be doubted whether the legal effect of that form of indorsement can be controlled or modified by proof of a usage existing to credit such items as cash, and permit the credit so given to be drawn against;* it being conceded that in the present case neither of the depositors saw fit to avail themselves of such privilege." (Italics ours.)

To the same effect, see *First National Bank* v. *Armstrong* (C. C. S. D. Ohio) (1890), 42 Fed. 193, 196; *Clark, &c. Co.* v. *Americus National Bank* (D. C. S. D. Ga.) (1916), 230 Fed. 738, 740; *Peoples State Bank* v. *Miller* (Mich., 1915), 152 N. W. 257, 259.

In *Morse on Banks and Banking* (6th Edition), Sec. 583 (C) the author has this to say regarding the allowance of credit:

> "This is a mere gratuitous privilege allowed by the bank which does not ripen into a binding legal usage * * * but this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing, *its long continuance* gives no real right whatsoever to the depositor to demand its continuance, or its practice in any individual case, whenever the bank may for any arbitrary reason see fit to withhold that favor." (Italics ours.)

Paton's Digest of Legal Opinions and Banking Law, Section 2738 reads:

> "Restrictive indorsement to bank for credit to account of third person may be charged back if item not paid."

The foregoing authorities are ample support for the view expressed for the Circuit Court of Appeals by Judge Learned Hand, where he says (R-35):

> "* * * * * Not only were the items themselves at once credited but interest upon them as well from the time of their receipt. This too we think immaterial. The immediate credit of such paper is itself evidence of the creation of a debt from the bank to its depositor and on its face presupposes a purchase of the check. But such an entry will not control the form of the paper. We do not see that it adds anything of substance that interest has been credited. Such entries are not kept in suspense or entered 'short', but are reversed, if the item be dishonored.
>
> * * * * * *
>
> It appears to us that to make the added credit of interest so important is to deal in unrealities. When an account bears interest it is as natural to begin to credit interest at once as to credit the item at all. Any distinction seems to us gratuitous."

The Supreme Court of the United States has recognized that in cases of restrictive indorsements where a check is indorsed for collection the collecting bank has a dual duty —collecting and crediting.

> *American National Bank* v. *Miller* (1913) 229 U. S. 517.

In the present case Knauth, Nachod & Kuhne failed to perform the function of collecting.

It is quite evident that the allowance of interest in the case of individuals, assumes a very different degree of importance from interest in cases where banks are involved. For example in the case of *Upshur* v. *Briscoe* (1891), 138 U. S. 365, relied on by the plaintiff, there was an agreement between lawyer and his client, who apparently desired to have the lawyer administer the interest of a certain fund. The question presented was whether the arrangement was one of a fiduciary character which would survive the discharge in bankruptcy under the existing act. The court held that it was not a trust and that the discharge did in fact operate. The case has nothing to do with allowance of interest by banks and is not in any way appropriate to the case at bar.

The reason why the facts cited in the case at bar under the authorities quoted above are insufficient to overcome the clear meaning of written words is found in an observation of the Supreme Court in the case of *St. Louis & San Francisco Railway Co.* v. *Johnston* (1889), 133 U. S. 566, in which the court says:

> "Because the banks often let good customers overdraw, do the latter thereby get the right to do so when the banks deem it improper to permit it?"

The fact is here that the checks in question were credited on the books of K. N. & K., but nothing appears to show that Röchling had the right to demand that this be done. The fact is that an entry allowing interest from July 15th was similarly made, but no right to demand such an entry has been shown. And so on. And yet to override the writ-

ing on the checks it is necessary to say that a collection of facts, none of which individually amount to rights, do in the aggregate amount to a right hostile and superior to the written wording on the checks themselves.

It is submitted that on the facts of the case and under the authorities above quoted such a position cannot be maintained.

5. THE FACTS IN THE PRESENT CASE BRING IT WITHIN THE RULE OF *White* v. *The Bank* AND NOT WITHIN THE RULE OF *Burton* v. *The United States*.

The appellant seeks to restrain the respondents' right to recover by endeavoring to apply the rule laid down in *Burton* v. *The United States* (1904), 196 U. S. 283, the facts in which case are substantially as follows: The plaintiff received an out-of-town check drawn to his order. He indorsed it generally and deposited it with the Riggs Bank, where he maintained a regular checking account and where this check, as well as others when deposited, was credited immediately before its collection.

In the *Burton* case there are no words of restriction of any sort appearing on the check. In the case at bar not only the payee but the method of payment is specified.

Again in the *Burton* case the situation is that of a depositor dealing with his own bank, whereas in the case at bar a third person makes a deposit with Knauth, Nachod & Kuhne for the account of Röchling.

The absence of any restrictive wording goes to the very essence of the matter, for in the words of Chief Justice Gibson in *Overton* v. *Tyler* (1846), 3 Pa. Stat. 348,—

> "A negotiable bill or note is a courier without luggage, a memorandum to control it, though indorsed

upon it, would be incorporated with it, and destroy it".

The distinction between checks with and without restrictive wording was one with which Mr. Justice Peckham, who wrote the opinion in *Burton* v. *The United States,* must have been unusually familiar because it was he when a member of the Court of Appeals of New York who wrote the opinion in *National B. & B. Bank* v. *Hubbell, supra.*

But the question is not left to inference since in the *Burton* case, on page 303, the very point is made perfectly clear in a quotation cited by the court with approval from the case of *Taft* v. *The Bank* (1899), 172 Mass. 363, reading as follows:—

> "So when, without more, a *bank receives upon deposit a check indorsed without restriction,* and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale in which, as with money so deposited, the check becomes the absolute property of the banker". (Italics ours.)

The *Burton* case and the *White* case are parallel and complementary authorities that do not conflict. The one where the bank is a lender of money with simply a debt to repay to the depositor—that is the *Burton* case. The other (and perhaps the older historically) where the bank is to obtain or pay funds from or to some distant point, to conserve valuables, or to perform some definite task—that is the *White* case.

In the case at bar the words relating to payment through the Clearing House are additional factors that bring the case within the purview of the *White* decision. The use

of this wording indicates that the National Bank of Commerce and the National City Bank did desire that Knauth, Nachod & Kuhne should be agents to collect the checks of these institutions through the New York Clearing House since in so doing these two banks knew that they would then pay their own checks through the Clearing House to some member bank who, under the rules of that institution, would have to guarantee prior indorsements.

In our view the case at bar has no relation to such cases as *Hook* v. *Pratt* (1879), 78 N. Y. 371, which the appellant cites. In that case a draft on the Treasurer of the M Company, payable to the defendant's testator, was indorsed "Pay to the order of Mrs. H for the benefit of her son Charlie". An action was commenced on the note against the defendant, who resisted on the ground that the indorsement did not import a consideration. The court held that the indorsement did import a consideration and that in the nature of the indorsement the indorsee might negotiate the draft although the wording on the draft gave notice of the interest of beneficiary named. Applied to the case at bar it means that Knauth, Nachod & Kuhne could have sued the National City Bank had the latter refused to honor its check but in doing so Knauth, Nachod & Kuhne would nevertheless, by the terms of the indorsement, be acting on behalf of the beneficiary, whose names appear on the checks, to wit, the respondents. These kind of indorsements are described in *Paton's Digest of Legal Opinions and Banking Law,* Section 2735, as being "not title conveying but merely agent creating and restrictive"

The difficulties that the appellant seeks to raise in opposition to this course are ones that have been repeatedly and unsuccessfully brought forward before, and in the case of

First National Bank of Belmont v. *First National Bank* (1898), 58 Ohio State 207, there is an interesting summary showing the consistency of the decisions of the courts in matters of restrictive indorsement despite the objections of custom, particular circumstances and hardships unsuccessfully urged.

To hold that by the terms of the check in this case Knauth, Nachod & Kuhne could not and did not obtain title thereto unless and until the proceeds had been collected in accordance with the instructions thereon, is to give full force and effect to such instructions and to follow the interpretations of repeated decisions holding that the words employed are restrictive in force. Such a decision makes for that uniformity that courts seek to reach in matters affecting negotiable paper.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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WILLIAM H. WHITE, JR.,
HENRY G. HOTCHKISS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1927.

Equitable Trust Company of New York as Trustee in Bankruptcy of Knauth, Nachod & Kuhne, Petitioner,

vs.

Carl Rochling, et al., Trading as Gebrueder Rochling.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Respondents, bankers of Frankfort-on-Main, maintained a general deposit account with the bankrupts, who were private bankers in New York City. On instruction of Lloyds Bank, Ltd., London, which was requested by respondents "to procure this amount for us" on June 15, 1923, "at Knauth, Nachod & Kuhne, New York," the National Bank of Commerce in New York on that day delivered to Knauth, Nachod & Kuhne, the bankrupts, its cashier's check for $30,000, payable to them "for account of Rochling Bank, Gebt. Frankfort-on-Main," and took from them their receipt for the check 'for account of Rochling Bank.'" On instruction of the Swiss Bank, London, the National City Bank, New York, on the same date delivered its cashier's check for $30,000, payable to the order of Knauth, Nachod & Kuhne, "A/C Gebr. Rochling, Frankfort A/M," taking from them a receipt in like form. On that day, too, the bankrupts credited the account of respondents with the two checks and made an entry on their books indicating that respondents were entitled to interest on the amount of the checks from that date. The checks were deposited by Knauth, Nachod & Kuhne in their own deposit accounts in other banks and were there credited to those accounts. On the following day, June 16,

1923, before the collection of the checks, the petition in bankruptcy was filed.

In receiving these checks, forthwith crediting respondents with them, and in crediting interest from the date of their receipt, the bankrupts followed the established course of their business with respondent which had extended over a period of more than two years. Periodic statements of the account rendered to respondents showed that interest was credited from the day of deposit, and that on occasion drafts were made against deposits before they had been collected.

Respondents' petition, filed in the district court for southern New York, for reclamation of the proceeds of the checks, was dismissed. The order of the district court was reversed by the circuit court of appeals for the second circuit [10 Fed. (2d) 935]. This Court granted certiorari. — U. S. —.

The proceeds of the two checks concededly have come into the hands of the petitioner, the bankrupts' trustee, and the sole question presented is whether the bankrupts on receipt of the check and before the filing of the petition in bankruptcy became the owners of them or whether, as the court of appeals held, Knauth, Nachod & Kuhne were respondents' agents to collect them. If the former, respondents were creditors of the bankrupts, *Douglas* v. *Federal Reserve Bank*, 271 U. S. 489; *Burton* v. *United States*, 196 U. S. 283, entitled to share only on an equal footing with other creditors. If the latter respondents were entitled to reclamation from the petitioner since the checks had not been collected at the time of the petition in bankruptcy. *St. Louis & San Francisco Ry.* v. *Johnston*, 133 U. S. 566; *White* v. *Stump*, 266 U. S. 310, 313; Bankruptcy Act, § 70 (a), c. 541, 30 Stat. 565, as amended, § 16, c. 487, 32 Stat. 800.

Ordinarily, where paper is indorsed without restriction by a depositor and is at once placed to his credit by the bank, the inference is that the bank has become the purchaser of the paper and in making the collection is not acting as the agent of the depositor. *Douglas* v. *Federal Reserve Bank*, *supra*; *Burton* v. *United States*, *supra*; *In re Jarmulowsky*, 249 Fed. 319, 321. But the court below thought, and respondents argue here, that the form of the check directing payment to be made to the bankrupts "for account of" the respondents operated to make them agents to

collect the paper. The point is made that this is the effect of these or equivalent words where the payee of negotiable paper indorses it "for account of" the indorser. It may be conceded that such an indorsement indicates that the transaction is not a purchase and sale of the paper and, at least when not otherwise explained or limited, may fairly be taken to mean that the interest gained by the indorsee is that of an agent for collection. *White* v. *National Bank*, 102 U. S. 658; *Evansville Bank* v. *German-American Bank*, 155 U. S. 556; *Commercial Bank of Penn.* v. *Armstrong*, 148 U. S. 50, 57;

Here, however, the words were used not by a payee in his indorsement, but by a third person making a deposit for respondents' benefit. They are thus of much less significance than in the usual case as data in determining the relation between respondents and the bankrupts, and the course of conduct of the parties becomes correspondingly more important. Moreover, the words themselves, despite their wide commercial use and the importance of giving them, as far as practicable, a uniform effect, have no rigid and unchangeable significance. Their purpose is to express intention. They are not an incantation which unfailingly invokes an agency. And the circumstances in this case indicate that they were here used with a different object.

The dominant purpose of the entire transaction, as far as respondents were concerned, was to arrange that a credit with the bankrupts should be available on June 15, and this they accomplished as soon as the checks were delivered to the bankrupts. While we need not stress the point, the added facts that respondents were international bankers requiring the credit, in the course of their business, and that the credit was effected by the deposit of cashier's checks, which pass among bankers as current funds, are not without their significance. Nothing in the previous course of dealing or in the actions of respondents indicates that they intended or had any reason for intending that Knauth, Nachod & Kuhne should take the paper as their agents for collection, or that any restriction should be placed on the use of the checks by Knauth, Nachod & Kuhne once they had credited respondents.

Nor was there anything in the relationship to the transaction of the New York banks whose checks established the credit to sug-

gest any reason or purpose so to restrict it. The duty of these banks was performed and their interest in the paper, apart from their liability to pay it, ceased as soon as they had delivered it to the bankrupts. But it was indispensable to the completion of the transaction that the bankrupts should be advised to what account the checks were to be credited. And it was apparently the function of the words in question to tell them. That alone, we think, was their purpose. To assign them any other would be to ignore the course of business followed here and banking usage in general, and to give them a strained and unnatural construction. We think the district court was right, and the judgment of the court of appeals is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.